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Roundtable Discussion: Where Do We Go From Here? Lesbian, Gay, Bisexual and Transgendered Civil Rights Into the Next Millennium

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QUEER LAW 1999

CURRENT ISSUES IN LESBIAN, GAY, BISEXUAL AND TRANSGENDERED LAW

THIS CONFERENCE IS A JOINT EFFORT OF:

THE LESBIAN AND GAY LAW ASSOCIATION FOUNDATION OF GREATER NEW YORK (LEGAL FOUNDATION) AND THE GAY AND LESBIAN LAW ASSOCIATION (GALLA) OF FORDHAM UNIVERSITY SCHOOL OF LAW

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This Conference is a Joint Effort of The Lesbian and Gay Law Association Foundation of Greater New York (LeGaL Foundation) and the Gay and Lesbian Law Association (GALLA) of Fordham University School of Law

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* This conference has been edited to remove the minor cadences of speech that appear awkward in writing.

INTRODUCTION

With this conference entitled "Queer Law 1999: Current Issues in Lesbian, Gay, Bisexual and Transgendered Law," the *Fordham Urban Law Journal* has undertaken an important responsibility and met a critical need in both the academy and bar. There are few areas of law that are as dynamic and fast-changing as that concerning the rights of sexual minorities. As I have observed elsewhere,[1] we stand at a critical moment of field formation, alternatively called "Sexual Orientation and the Law," "Lesbian and Gay Law," "Sexuality and the Law" or "Queer Law."

Why might the proceedings contained in this issue comfortably fit under the moniker "Queer Law," rather than one of the other flags under which this legal movement has marched from time to time? The answer is revealed in a perusal of not only the impressive participants in this symposium, but of the categories into which their remarks are organized. Ten, or even five, years ago, a conference such as this would have been constructed around topics such as "lesbian and gay adoption," "gays in the military," "discrimination against lesbians and gay men in the workplace," and similar sites in which "our" constituency has encountered bias and structural stigma.

The Queer turn that this conference reflects is one that rejects the building of a social movement or legal strategies around static identities such as lesbian, gay, bisexual or heterosexual, but rather regards the interrogation of those categories of identity themselves as one of its equality commitments. Framed in this way, a Queer legal movement wants to keep alive a set of questions with respect to the ways in which certain identities, like straight, gay or lesbian, are shaped by the homophobic and heteronormative world in which we live. It is for this reason that a Queer legal conference sets its focus on the places where and means by which homophobic and/or heteronormative power is at work in the service of normalizing heterosexuality and objectifying homosexuality, bisexuality and transgenderism.

Thus, you do not see "Lesbian" or "Gay" figure in the title of any of the panels that these papers were part of, although the panelists may at times speak in terms of the rights of gays, lesbians,

1. Katherine M. Franke, *Homosexuals, Torts, and Dangerous Things*, 106 YALE L.J. 2661 (1997) (reviewing WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW (1997); WILLIAM B. RUBENSTEIN, CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW (2d ed. 1997)).

bisexuals or transgendered people. This is the narrow line queer theorists must nimbly traverse: to at once recognize the ways in which people experience their own identities and are discriminated against as lesbians and gay men, etc., while leaving open a route by which we can renegotiate the meanings and experiences of those identities as a significant part of our struggles to greater freedom and equality.

The contributions that follow represent a rich array of expertise that has been brought to bear on this vital and difficult project.

ROUNDTABLE DISCUSSION: WHERE DO WE GO FROM HERE? LESBIAN, GAY, BISEXUAL AND TRANSGENDERED CIVIL RIGHTS INTO THE NEXT MILLENNIUM

MR. HARMAN: Judge Batts is a District Court Judge in the Southern District of New York and is the first openly lesbian member of the federal judiciary. She was appointed in 1994 by President Clinton. Formerly a full- time professor at Fordham University where she taught Domestic Relations, Pretrial Federal Practice and Family Law, Judge Batts is now an adjunct professor at Fordham and teaches Trial Advocacy and Domestic Relations. Judge Batts is a tireless contributor to the University, to GALLA (Fordham's Gay and Lesbian Law Association) and to the gay and lesbian community in general.

JUDGE BATTS: Thank you very much. Look at this panel. If we only had one of these people on this panel, this would be a panel rich in experience, knowledge and information. When I first looked at the list of panelists, my first reaction was, "Are you kidding me? How can we possibly let each one of these people give to the attendees of this conference what they have to give? There are too many. Cut them in half." They did not say anything until I got over that little hissy-fit. So I said, "Alright, we are gonna do this." And so, my role here is to be referee so that I can make sure that everybody has an equal opportunity to weigh in with their knowledge and expertise.

I am going to give very brief introductions of the panelists before I start with a lead off question, and I am going to invite the panelists, if they wish, to enlarge on what I say about them, as they respond to the first question.

Matt Coles, director of the ACLU Lesbian and Gay Rights Project, and a long time advocate and litigate on behalf of the lesbian, gay, bisexual and transgendered ("L/G/B/T") communities.

Paula Ettelbrick, legislative counsel at the Empire State Pride Agenda and national coordinator of Equality Begins At Home, a project of the National Gay and Lesbian Task Force.

Professor Nan Hunter, professor at Brooklyn Law School, author of a case book on law and sexuality and a founding director of the ACLU Lesbian and Gay Rights Project.

Evan Wolfson, director of the Marriage Project at Lambda Legal Defense and Education Fund, and one of our community's main proponents of lesbian and gay marriage.

I will begin with Matt Coles. What do you think our priorities ought to be as a community, and who should identify our goals and determine how they are best achieved?

MR. COLES: Thinking about what our priorities are raises two very different questions. The first is: Where do we think lesbians and gay men are getting hurt most in society? That is a qualitative and quantitative inquiry that might lead us to different places. The second question is: Which of these problems are such that lawyers might have something useful to contribute (I use the word "lawyers" instead of "litigators" particularly because I do not think the only useful thing lawyers can do is litigate)?

The problem that occurs when answering these questions is that we, as lawyers, often focus in on answering the second question before adequately dealing with the first question. Far too often our sense of where people are getting hurt is driven by what we think we can do well as lawyers and by our own experience of where the problems lie.

Having said that, I would like to introduce some of the more important areas that need to be addressed. The first problem area is relationships. In defining "relationships," I refer to parents and children because that is an area where people are hurt terribly and where lawyers, particularly in litigation, are uniquely equipped to assist the problem because much family and parenting law is made in the courts.

Additionally, schools are places where people get hurt and where lawyers can have some of the greatest impact. I think it is the place in the post-*Romer*[2] world where it is actually possible for lawyers to do things. Further, getting rid of sodomy laws would be a benefit because they hurt the lesbian and gay community in non-obvious ways. It is a cliché among lawyers to say that the harm these laws inflict is not necessarily through direct enforcement, but through the role they play collaterally in proceedings like custody. I actually think, however, that greater harm comes from the use of these laws as a means of political dis-empowerment. In debates over civil rights and domestic partnership laws that recognized relationships, sodomy laws are consistently and somewhat effectively invoked as a way of ignoring our voices. These laws suggest that

2. Romer v. Evans, 517 U.S. 620 (1996).

our claims and aspirations are not legitimate; and fighting these laws is something that lawyers are capable of doing.

JUDGE BATTS: Thank you, Matt. Paula, do you have a different perspective on what our priorities ought to be as a community, and would you identify our goals and determine how they are best achieved?

MS. ETTELBRICK: I tend to think of priorities in a different way, not so much substantive, but in terms of the process we use to achieve those goals. Having been at the Pride Agenda for the last four-plus years doing legislative work, and at Lambda Legal Defense for the seven years prior to that doing impact litigation, my perspective has changed a bit. I believe that we need to ratchet up our resources in the legislative arena, which includes efforts to get lawyers to work with state legislative advocacy and political organizations to draft better laws. I am the only person in this country who was hired by a state political advocacy organization as a lawyer to do legislative advocacy and drafting. I would like to see a world in which every state has a lawyer on staff, or at least a committee of lawyers who volunteer their time to work with legislators at the state level. The state level is the heart and soul of the issues that we are facing.

Matt mentioned sodomy laws and relationships. These are quintessential state law matters. If legislators do not have the resources to help them, we are working against the trend with them. What I find, working with the state legislature in New York, is that there are very few lawyers on staff. This requires legislators to rely on central staff persons to draft laws. The result is the passage of laws that we would never want to litigate under, and that make no sense to us. Consequently, I work with those people to clean up some of those statutes that do get drafted, and also look politically at how to get some things passed.

As a strategy, I do not think we should put all our eggs in the "we have to get a hate crimes bill or a non-discrimination bill" basket. While those are very important endeavors, there are hundreds of bills that I think could get drafted, particularly in the family definition area, passed in the most conservative state legislatures, and signed by even moderately conservative governors, that would be beneficial. I do not want to overstate the case, but in that part of the process we could make some headway in significant ways. Our legislators are only as good as we are in getting involved in the political process, and getting them elected or de-elected. And so, I look at reality, in conjunction with the incredible work that my col-

leagues on this panel have done at the ACLU and at Lambda, of really trying to move forward in how can we address the concerns at the place where we really live most, at the state legislative level.

JUDGE BATTS: Thank you, Paula. Now, one of the things that Matt mentioned is relationships — he mentioned parent-child relationships, school relationships and sodomy laws. Evan, I want to ask you, are there any other relationships that you might be able to think of that perhaps might and should deserve our attention?

MR. WOLFSON: I think we are at a breakthrough opportunity with regard to winning the freedom to marry, and I think that is really important on two levels. I think to some extent we have lost sight of what, in a way, is the most important level. On the one hand, our fight for the freedom to marry is important because winning marriage as a choice for gay people would be extraordinarily important in concrete and real ways in people's lives and as a transformative statement of our position in society. I do not think there is any single thing we could achieve legally that would so substantially transform our position in society as to win that choice and cultural position. I also think the battle for the freedom to marry is important because the process of the battle — what it will take to win it — gives us unparalleled opportunities to engage non-gay Americans and people around the world in a discussion about who we are, what our lives are and what the possibilities are for us and for other non-gay people in a vocabulary that is rich, sustained, important and different from the stereotypes that have held us down. So it is both the achievement itself and what it would take to achieve it that gives us the extraordinary opportunities that I think we must seize in order to maximize our opportunities to really move ourselves forward in the way that I think all of us on this panel want.

I actually think we have two goals or priorities, if you want to call them that. One, I think, is to eliminate barriers that impede individual choices about how individuals want to live their lives and how they want to build their relationships with their families and loved ones. Particularly with regard to sex and sexual orientation, I think it is the mission of those of us who have chosen this path in life, but I think generally we are all committed to eliminating those barriers.

The second thing that we also want to achieve is to enlarge the sense of possibilities that all people, gay and non-gay, and people who define themselves with other labels, have in life. I think all of us are probably very committed to both equality and freedom and

we want to make a world where we can achieve both. To me, the great opportunity we have in our community and in our movement right now, something we have labored for decades to achieve is to get the attention of the majority, to get the attention of non-gay people and engage them in dialogue to find them where they are and move them.

To me, therefore, the single biggest priority of those of us who are working on these issues full-time or part-time, is to both make extraordinary contributions, and to engage non-gay people. Find them, talk with them. Do not just talk amongst ourselves. Do not just say things in which we believe that make us feel good in the rhetoric or language we are familiar or enjoy, but find where they are, engage them and bring them along, because that is how social change occurs in a democracy spurred by the kinds of prods we as litigators or as legislative tacticians use.

That is the opportunity we have right now, and marriage gives us a powerful bridge into that challenge because nothing captures their attention, changes the dialogue and gives us a renewed vocabulary like fighting over the freedom to marry, not that that is the only thing we care about, but that gets their attention and gives us the biggest batch of opportunities and challenges.

JUDGE BATTS: I want to take these issues of the parent-child relationship and marriage and put a more focused question to the panelists as a basis for bridging into another general area that is important. Frequently, marriage is inexorably linked to the issue of having children.[3] The question is, should it be this way, and if not, how do we go about altering this association? Let me ask this of Matt and Evan before we open it up for the entire panel.

MR. COLES: I think there is one sense in which the link between marriage and parenting (in a superficial way) is a construct usually used by the opponents of opening marriage to try to keep us out of it. Having constructed an institution that at least, on its face, has not had much to do with raising children (in the sense that it has not been thought to be a requirement for it in any sense for a long time), to suddenly say that is the essential nature of it, that is what defines it, I think in some ways is kind of a dodge.

By the same token, I think nothing brings lesbian and gay relationships to the forefront of public consciousness better than the relationships of lesbian and gay couples with children. Thinking

3. *See, e.g.*, Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (holding that the Hawaii Constitution does not give rise to a fundamental right of persons of same-sex to marry).

about it not in the way our opponents have used it, as a defense in marriage cases, but in a way that we have been, such as the dialogue with America Evan was talking about regarding lesbian and gay relationships. And while I think Evan and I do not totally agree on the terms on which we ought to be having that dialogue, I think we both agree very much that it is got to be going on.

One of the best ways to do it is to think about ways that present lesbian and gay families to the rest of America so that they can begin recognizing that we are here, that the families are here and thinking about what we are really like. The best way to do that is in terms of relationships with children. I love adoption cases, and I love adoption as an issue. I like it because it brings lesbian and gay relationships to the fore in a great way. In these situations, most typically, there are two people working very hard to do something for somebody else, and frequently, for somebody who nobody else cares about. It brings the relationship to the fore in a way in which it does not simply focus on the two individuals in the relationship, what they want and what their sense of entitlement is. I do not necessarily think that is inexorably linked in any legal way, but in terms of that dialogue, I do think it ought to be at the core of it.

JUDGE BATTS: Evan?

MR. WOLFSON: I, as always, totally agree with Matt. I think the distinction between legal and cultural is very important for us to understand. The fact of the matter is we live in a culture where most people talk culturally, not legally. When people hear the word "marriage," when people hear the word "family," when people think of children, they think of them all together and go about talking about them. This is our opportunity to raise all of these issues including the larger issue of equality and respect for families, which is what we are fighting for. I do not think we need to put a huge amount of energy into trying to figure out how to disentangle it.

I do think that putting forth stories of lesbian and gay people with kids in any manner, without kids, having commitment ceremonies, living alone, are all important.

One of the things that I think is really critical that we need to get over and move into the next phase of, is not giving ourselves false choices. We do not have to sit here in our movement and in our organizations and decide, "do we work on adoption or marriage," or "do we work on domestic partnership advances or fight for the whole full range of equality under marriage and other opportunities?" We do not have to make those choices. We have to be tacti-

cally smart, patient and persistent, keep using the word marriage, keep engaging the dialogue, even while we take the components along the way, and never accept any single thing as a substitute for full equality.

JUDGE BATTS: Nan, I have a question then in terms of what we have talked about so far. Obviously there is one consideration here that is either a wet blanket or a limiting consideration, and that is money. As a professor who is very good at theorizing, let me ask you, if an organization that you supported won the lottery, what would you do with the money?

PROF. HUNTER: One of the things that I would use the money for, in terms of building an infrastructure or structuring an organization, would be to think about the process by which we come to these decisions. Even if we understand that we do not have to pick the magic bullet issue and that we have to be flexible enough to adjust to the time, the question arises as to how we do that. What is our obligation as lawyers to have a better and broader perspective? It is very important for us as lawyers to try and navigate this tension. We are not doctors, and we are not activists, or social workers, or whatever. We are lawyers who bring a certain set of skills to this enterprise, which is what we ought to bring. We should not be blinded by those skills. We need to figure out better ways to structure in the broader perspectives and not just say, "since I am a lawyer, I think this way, so this is what the organization is going to do."

I would like to see lesbian and gay organizations consciously and consistently build up links with client organizations. By that, I mean with the kinds of organizing or community groups that do not do law, but do direct organizing. I think that social change lawyers are most effective when they have organized client constituencies that themselves do political work and grass roots organizing.

Let me give you a little example that is fresh in my mind because I just heard him speak. A young man named David Pumo, who graduated from Brooklyn Law School in 1997, went to work at the Urban Justice Center. David now does a combination of legal and organizing work there with gay youth, particularly homeless gay youth. Arising from that work is a lawsuit against the City of New York in which David is representing L/G/B/T youth in foster care, which is where kids on the street go. That lawsuit is a really good concrete example of litigation growing out of grass roots community work — of seeing a problem on the street, a very crucial prob-

lem to a very disadvantaged portion of the L/G/B/T community, and translating that into a lawsuit.

That is what we as social change lawyers ought to do: translate into lawsuits the injustices in our community. Sometimes the injustices are obvious and we can trust ourselves to see them. We would do a better job, however, if we more consistently developed relationships with those kinds of organized constituency groups.

JUDGE BATTS: Thank you. Let me ask some of the representatives of the wonderful organizations we have here that same kind of question: if the organization won the lottery, what would you do with the funds? Paula?

MS. ETTELBRICK: I appreciate what Nan said about that because I think it is the engine of social change work for us as lawyers. We are informed by the events that happen within our community, to different segments of our community. I think it is very easy to define the generic approach to our work. The reality of our community is really different and much more than it used to be. When younger people come out at younger ages, it represents a whole new range of social reaction to them, a whole new reality for their lives, a whole new thing that we need to address more notably.

The lottery question is always a good one, because it forces a person to set priorities and look at some of these things. I would really look at stepping up our approaches and our work. What I would love to do is hire a couple of lawyers in every state to work on state legislative work, from and L/G/B/T community perspective: coalition building, working with state legislators, working to craft legislation that can benefit our community because there is a natural way in which litigation can occur with only a limited context.

If we do not have statutes supporting our positions or entitling us to certain kinds of rights in society, then there are always going to be limitations on our rights. I think building more of the connection between our national and state groups in particular is important.

Some of that started already through a group called the Federation of L/G/B/T Statewide Political Organizations where the state groups have come together. Part of what we are building and working with includes better connections and relationships with national groups. Each state operates in a very different way, and the broad base approach to where the law is or where it stands is no longer going to work for us. In arguing some of these cases,

even the family cases, we see a rush of anti-gay foster care and adoption bills in almost a dozen states this legislative term. What has come to the forefront is that people really need to know how to fight those off. The language of rights does not work in the adoption or parenting context as we as lawyers know. We do not go into court and argue for the rights of lesbian and gay parents, we argue for the interests of children. That is the legal standard, and part of what the educational process of the activist community is: to really understand the difference in dealing with family issues at and in the legislative arena, in the legislative area, as opposed to other kinds of issues. Therefore, I would really like to see those connections drawn much more tightly and resources built up at the state level.

JUDGE BATTS: Matt?

MR. COLES: If I actually won the lottery, I would first take the money and try to figure out how to make the kind of connections Nan talks about in a meaningful way. The problem with Washington D.C. is that people down there think having a meeting is an accomplishment. Too often, the way we try to do what Nan was talking about is talk to ourselves in our own organizations. I am skeptical about how far that takes you.

I guess the first thing I would do with the money is hire some smart people to help me figure out how to deal with that. The other thing that I would say is that I would want to be attentive to the other end of it as well. When you do public interest work for a while, whether it be litigation or legislation, you realize quickly that court orders and court decisions do not change society, and neither does legislation. Just because the Supreme Court says we are going to desegregate the schools with all deliberate speed, does not mean it happens the next day. Just because Congress says we are not going to have any sex discrimination in the workplace does not mean it happens the next day.

In very practical terms, one of the limitations of the kind of work that we all do is not only not getting the information up front, but crafting and delivering the goods at the end. Too often we stop at the level of getting a court decision or a piece of legislation and saying, "We are there. We got it." We really are not there, we are at best half way there and how you take and deliver the message and make it reality seems to me to be not quite as big a problem Nan was raising, but also one onto which I'd get my consultants and say, "how do I take this now and deliver it and bring it home

and make it work to the end?" Far too often legal organizations just stop too short.

I actually think that organized constituencies can do that. I can appreciate that there is a lot of talk and a lot of meetings, but I think there are some organizations — service organizations, other organizations — that are really out there. When I was doing abortion rights work, we had repeat clients because we represented abortion clinics. Having repeat clients is very helpful because it keeps you very much in tune with certain segments of the community.

MR. COLES: I do think there is a huge difference between service organizations that are doing things directly and service organizations that are not making that direct connection. I think that is very well taken.

MS. ETTELBRICK: Well, part of it is the process. I agree that we cannot just win a lawsuit or pass a single law and think that is the end of the job. The legislative process is quintessentially an educational process as well. There is no bill that supports the lesbian and gay community that is ever going to get passed unless the legislator and the legislator's constituency are educated.

So there is a way that the legislative process relies on education. If we get a law passed, it demonstrates that we have brought people along, and gotten them to understand some basic element of our lives. Litigation does that as well. I think litigation can be very educational. Lambda and the ACLU have made an art of filing lawsuits and doing the educational work by getting the press attention on the issue, so that people can see a story in a context and begin to talk about it and make up their minds about it. Therefore, I think all of this is so much a part of a process, and keeping focused on what some of the ultimate goals are and making sure we are reaching out in the broader processes will ultimately result in a societal change.

JUDGE BATTS: Evan, I want to know what you would do if your organization won the lottery?

MR. WOLFSON: If Lambda, as opposed to myself, won the money, I think we would keep doing more of the work that Lambda does, perhaps by opening one, two or three more regional offices to closer serve the regions and to spark the kind of political and public education mix that goes along with litigation. We would launch more projects like my colleague, Doni Gewirtzman has launched. Doni was specifically brought on to do an outreach to older lesbians and gay men.

We would also work on trying to do the kinds of things Nan is talking about, namely finding other areas of our community and working to reach out to them. That is the kind of work I think that Lambda and the ACLU have actually done very well, and will continue to do more of and would be willing to put money into.

If I won the lottery, and could actually decide how Lambda would spend its money, of course I would do exactly what Lambda suggested by funding more of Lambda, the ACLU and the other organizations.

I would also put a large chunk of the money in a different direction than has been discussed here. I would use it to seed or spur state and local groups to create more hands-on, small, local infrastructures with the mission of doing outreach and engagement of non-gay people.

The most exciting example of activism that I have seen in the last couple of months took place about three weeks ago in Sacramento, where two lesbians held a commitment ceremony. More than ninety ministers from around the country flew in. These ministers were not gay ministers. Rather, they were there to make a civil rights statement by blessing the celebration, and by defying church law, if necessary, in order to support their freedom to marry culturally and legally. Non-gay ministers made that statement. That is what I would use the money to do to engage non-gay people in dramatic dialogue. The good news about the lottery question is that this type of activism does not cost a lot of money. Volunteers can do it. Anyone can get up and engage non-gay people and find something that will generate this kind of discussion. That is how I would use the money and the energy, trying to focus people's attention.

JUDGE BATTS: Matt, you wanted to say something before?

MR. COLES: It was a small point, but I wanted to actually register a small disagreement with Paula on the educational value of the legislative process because I think it is declining, although not in every circumstance. I think legislatures across the country, like Congress in the last thirty years, have gotten districted more and more into safe seats. I think legislators are less and less worried about their constituents. People got elected year after year, in the era in which you had to educate constituents to make change regarding lesbian and gay rights. I am not sure whether that is necessarily true anymore of many issues and legislatures.

If you look at those astonishing Gallop Polls, eighty-six percent of the American public thinks there ought to be employment dis-

crimination laws, but we cannot get past ten legislatures across the country. I think one of the reasons we cannot get past those ten legislatures is because many legislatures have become polarized along safe seats, allowing them to be less responsive to constituents. There is still a lot that you can do with the legislative process, but I think it has less of that great inherent, built-in educational value that it did before that kind of districting took over.

MS. ETTELBRICK: I think that is a good point, Matt. I think the other side of it, however, is that they do begin to listen when you organize against them in their districts over some of the issues, and part of the gap that I see, and that the Pride Agenda has been working for years on developing, is exactly what Evan is saying — building up the infrastructure at the local level; getting people involved in political campaigns; getting them in there.

I have seen some legislators in New York who, because the last ten out of the twelve people who worked on their last campaigns came from the gay and lesbian community, have had to hold the line on issues that I know they were not happy upholding. I think people have been dis-empowered from even working in political campaigns for the reasons Matt mentioned. New York has one of the highest incumbency rates of any state legislature in the country. It is disgusting. These people are not accountable to anyone, and part of the process is getting people fired up and working strategically on this, which is part of what we do . . . I mean, we know that the civil rights bill has the votes in the state senate here in New York to pass. We cannot get the senate majority leader, however, to allow a vote on the bill. This year is the twenty-ninth year that New York State has tried to pass a civil rights bill banning sexual orientation-based discrimination. The Assembly passes that bill every year. The Senate majority leader, Joe Bruno, refuses to allow it to pass because he is in a rural district outside of Albany and it is hard to capture his attention. He just hates us. But we have slowly and methodically gone through and dragged some of these people along by getting very involved in their re-election campaigns.

In the midst of the international response to Matthew Shepard's death,[4] the Wyoming legislature killed the hate crimes bills this past week. So did Utah and Montana. People are not accountable

4. Matthew Shepard was a gay college student who was killed in a hate crime. *See* James Brooke, *Gay Man Dies From Attack, Fanning Outrage and Debate*, N.Y. TIMES, Oct. 13, 1998, at 1. He was kidnapped, robbed, pistol-whipped and left tied to a fence for 18 hours in near-freezing temperatures. *See id.*

because they do not believe there's really a political price to pay for going up against the gay community. We have not really focused, and I think Evan is right on the mark when he says that we really do need to get beyond ourselves. We need to strategize about this. We need to get beyond our own community. We need to talk to our supporters. They are out there. We know that they are, and we need to use that polling data that says eighty-six percent of the public believes non-discrimination laws pass, or should be passed. Make this real to these people by taking a few of them out of their jobs. That begins to send a message at the state level. It is pure politics.

JUDGE BATTS: Evan?

MR. WOLFSON: I think the way to do that is by going and asking them for support. We are pretty good at demanding in our community. We have organizations that do a great job of demanding our rights in court, as we should. That work is very important and valid. That kind of activism has a long and noble history, and it is an important methodology, but demanding is not the same thing as asking. Asking for support is critical. Saying the words: marriage, equality, lesbian, gay, bisexual and transgender. Saying the words, over and over, and giving people a chance to move and to be fair. If we do not go and ask them, how do we expect them to just do the right thing?

What I actually raised my hand to say was something different, and it concerns another arena that we have left out because it has been a very unsuccessful arena for us generally. I think, however, it is one that we have to take seriously and deal with, and that is the ballot measure — the initiatives. More and more there are efforts to put our rights up to a vote. We have all seen this and we have seen precious, important, heroic victories deferred or snatched form our grasp when people get an opportunity to short circuit them through the electoral process. We have to engage that. We have to deal with it. We cannot ignore it, and the only way to seriously engage it is with two important ingredients. One is to mount intelligent, careful campaigns. The other ingredient is to continue laying the groundwork by engaging more and more people in that cultural dialogue. We must do this over time, because it is a long process and every month that we do not do it is a month we have not put ourselves in a position for the battle that is inevitably going to come. In March 2000, there will be an anti-marriage, anti-gay initiative on the in California ballot. People in California know that. People nationally now know that. What are we doing?

How many months are we going to wait before we engage in the fight?

JUDGE BATTS: When you talk about the ballot initiative, you are not talking about the ballot initiative as our friend, you are talking about the ballot initiative as our enemy. How can we go up against it?

MR. WOLFSON: I think historically it has rarely been our friend, and I am uncomfortable with the notion that people's rights should be put up to a vote in an affirmative way. Indeed, the danger is that it is used as an opportunity to tear holes in constitutions, to polarize and to divide and attack. If we do not successfully fight back, not only do we not have a chance of not winning, we do not even move forward. When you move forward, you do not necessarily win every battle. By engaging, reaching hearts and minds and having discussions, however, you put yourself in a better position to fight the inevitable next battle.

JUDGE BATTS: That brings me to the next question I wanted to put forth, which is obviously sort of a continuum of what we have been talking about. We have the Lesbian and Gay Lawyers Association of Greater New York ("LeGaL"), which is obviously one of the sponsors of this conference and for which we are eternally grateful. By its name, we know that it is an association of lawyers. A lot of the panelists have been discussing that "we as lawyers" need to do things and reach out. I guess one of the questions is how should we, being primarily law-based organizations, accomplish the interaction with and reach out to other organizations? If they are a professional organization, for instance ballot initiative fighting, is there an organization of L/G/B/T advertising executives that we could try and get together with and do some sort of educational campaign in a way that catches the eye of the community when we know of these issues? How do we know of other organized groups that we can reach out to, and even if it is not bringing a lawsuit but working in the policy area, how do we actually go about doing this?

MR. WOLFSON: For the last several years, we have reached out. By we, I mean Lambda and other groups who have seen what the consequences of the 1993 Hawaii Supreme Court ruling[5] were. After this, the world changed and we had to get involved and deal with it. For the first time, we have reached out to every national lesbian and gay organization to try to bring them together to meet

5. *See Baehr*, 852 P.2d at 44.

regularly and to work on this change. We have reached beyond the national organizations to state and local groups for the first time. That had never happened before in a sustained way, and I think it occurred in large part to the sustained effort that the Task Force is exerting with regard to the Federation. We have reached out to non-gay allied groups and tried to bring them into regular meetings to actually move this forward. Anyone who has been within the sound of my voice has heard tirelessly the need to do various things. This message has been directed indiscriminately at everyone. So, that is what we have done.

The results have been mixed. I think more has been achieved in these ways than had ever been done before. The national dialogue about the freedom to marry obviously has taken off. The fact of the matter is people cannot only hear my voice, people cannot only hear Lambda or these groups' voices, we need to enlarge that. In an ironic way, we find ourselves at this juncture where non-gay people, by and large, better understand the urgency and meaning of this more than many lesbians and gay men do, because they live in the world of marriage. Non-gay people understand why this is important. They take that vocabulary seriously. Rather than trying to find every last lesbian or gay person or try to break people into working on something they do not want to work on, I think it is important that those people who do understand the urgency of the moment, and who care about this go out and find those non-gay allies and the gay people who do understand and who do care either affirmatively or because they understand the perils of losing, and there are many of those as well. We do not have to attack each other over this. This is not something people need to be forced to do. It is something they want to do. There are plenty of people out there who are reachable who have not been asked. Those are the ones I would focus on.

JUDGE BATTS: It seems to me that there are issues that we are talking about that individuals have very strong feelings about one way or another. There are individuals who feel that being a parent is something that the straight community does and that one of the reasons that we revel in the freedom and individuality of our sexual orientation is that we are away from that world where children are included.

Another area of course is marriage; whether or not we should marry. We do not want to marry because we eschew that whole heterosexual way of doing things and we revel in our freedom and individuality and do not want to get married. Once we say that

there are individuals within our community who do want to have children, who do want to get married, does this result in an inevitable tension so that we cannot work together for things that one individual or group of individuals may want and others do not? Do we have to look for something that everybody agrees on as such a basic a common denominator and those are the only things we work on? What do we do when we feel strongly and differently on issues upon which, if you will excuse a term from the judicial arena, reasonable people can differ? How do you work still as a community even when one member does not want to get married and does not want to devote his or her resources to that, yet another member of the community absolutely does want to get married and wants to devote community resources to that? How do we arbitrate, mediate and adjust? How do we continue to work? What do we do here?

MR. COLES: I am going to give you a very inadequate answer, but it seems to me that you do not wait for something that everybody can agree on because we will wait until hell freezes. You do not need to do that, and in any sensible movement people not only find lots of different ways to get to shared goals. I remember in a ballot initiative in 1978, when a huge fight occurred about how to fight California Proposition 6.[6] Do we fight Proposition 6 by doing mass advertising, do we fight by going through conventional political party routes, or do we fight by going to the streets? What we wound up doing was all three things. We had an organization called the Coalition Against the Briggs Initiative that went through the streets; we had the "No On 6 Organization" that went through conventional politics; and we had another organization called "SORE," that tried to go the advertising route, and it worked pretty well.

I think you have to find ways to accommodate both people's differences and goals and their different senses of how to get there. However, at the very same time you have to recognize that there are consequences to things that people do, both in terms of routes they choose and in terms of issues that they choose for everybody else. You know that when you wind up with a ballot initiative, for instance on the ballot in California in 2000, that has enormous consequences in terms of almost whatever you do about it; where resources are going to go, what the law in a very important state is

6. CAL. PROPOSITION 6, § 3(b)(2) (1978). The Briggs initiative would have amended the California Education Code to permit the state to refuse to hire/fire a teacher who engaged in public homosexual activity or conduct.

going to look like and what the debate is going to look like. I think that what is critical to make that work is not to try to get everybody on the same page either on methodology or on issues. People have to pay attention to the consequences of what they do, what people's different views are, and try at least to reach some level of dialogue of how these different views are going to affect each other. We cannot assume that the fight is going to be about this or has to be about that or we are going to make it about this.

Like I said, an inadequate answer.

JUDGE BATTS: I do not agree with your characterization of your answer. Evan?

MR. WOLFSON: Oh, I do not agree with that characterization either. I think that it is a very good answer. I guess there are a couple of things that it invokes in me. One is that Matt and the other people who heroically fought against the Briggs Initiative successfully, which was a California measure about twenty years ago saying that gay people should not be allowed to work for schools. Obviously, an incredibly hot button – a difficult, challenging issue twenty years ago. At the time, many gay people as well as non-gay people said "you are out of your mind, you cannot defeat it."

Of course, you went on to win. Those are important lessons and I agree with Matt about the three kinds of campaigns we need to be considering. I think the right answer is all three and we must start now. Do not spend another six months discussing that because it will be too late and all you are left with is the opportunity to do a crash course, rather than the kind of sustained, slow, patient, persistent engagement that we need to do in conjunction with a media campaign and the fund raising that needs to be done.

So, I think those lessons that Matt evokes are very important and real, particularly the lesson of: Do not listen to the people who always say we cannot win. A second important lesson that I think Matt mentioned in his answer is that the process of battling, ideally will result in a victory. Hopefully, you will win that battle. If you fight the battle, whether you win or lose that particular battle, you have advanced your ability to win the war because you have at least gone forward. If you do not fight, if you pretend that you cannot, and instead want to change the subject, then all of the non-gays will talk about us and say that through that battle, we lost. I think that is unacceptable and I think that it is also one of the lessons of the Briggs Initiative fight.

Going to Matt's point about consequences, I think that it is absolutely true that people have, as I said earlier, a right to choose what they want to work on and what they care about. I would correct one thing in how you framed the question, Judge Batts. I have never seen that what either we at Lambda, myself or others are fighting for as "marriage" so much as it is the "freedom to marry." I am not fighting for mandatory marriage. I think I would be a bad apostle for the cause of telling every gay person they should get married. However, I think what we are fighting for is the freedom to marry and all that it signifies: choice, equality, opportunity to make your own decisions about how to protect your family and not be shut out of a central social and legal institution simply because of your sex or sexual orientation. That is what I believe we are fighting for, and those who chose not to put their energies into that are entitled to make those choices and they have in many cases from their own lights very good reasons to do so.

There are consequences, however, and to me the important thing is not that people have to believe that marriage itself is so important or that even the freedom to marry is the most important thing. What people should pay attention to, in my view, is: what is the opportunity at hand?; where are the break-through opportunities at hand?; tactically, what if we do this now, will it put us in a better position later? People should not simply think that we have the luxury of historically changing the channel to having a dialogue about something we want to talk about in our own language, when society is reachable and engageable though engaged somewhere else. That is an imperative that an activist must take seriously. An activist must figure out how to achieve something because you just do not like something or even avowedly have ideological concerns about it. To make a real strategic choice based on the real opportunities you are giving up if you do not engage here and choose instead to hold out for this or that.

PROF. HUNTER: I would like to just jump in because I think Debbie you have touched a nerve. I think the nerve you touched in framing your question is the range of views within the L/G/B/T community about sexual politics. I think there are two things at work here; one is very obvious, one is a little bit less obvious.

The obvious point is that we are a very diverse community ideologically, and there is a tension built into a L/G/B/T group or any group organized along identity terms, because you are by definition representing a community that is very ideologically diverse. Not only is it ideologically diverse on an issue like NAFTA, but it is

ideologically diverse on the issues that pertain to our rights and the strategies to achieve those rights. Some of that is like the tensions that will never go away about different modes of organizing, or legislation v. litigation or whatever, but some of it really goes to the heart of questions that we not only have strong political beliefs about, but we experience very strongly in our own lives. People are very deeply engaged with questions about whether the right to marry really represents them in some kind of cultural sense, or represents what they think of being gay or lesbian is all about, and we simply have no choice but to respect that. I am someone who feels very strongly identified with what has traditionally been lesbian/gay culture with it is urban focus and its orientation toward being an outpost for sexual agency and freedom. That is something that is very important to me. I also realize that the old phrase "we are everywhere" is quite literally true and as more and more people come out, which is wonderful, more and more people come out in lots of places that I find surprising. I, for example, have to grapple with the fact that gay republicans are as gay as I am.

I used to be in a position at the ACLU of representing the community and I no longer am. My life is easier; but my colleagues are in the position of having to speak for a community that is diverse in many ways, and that is no easy task. Particular battles, like the California referendum battle, will force us to deal with this and negotiate, hopefully in good faith, and come up with strategies that take advantage of the differing skills that we bring to the table. I think that we ought to try to be positive about this diversity in presenting it to the outside world.

One thing that troubles me is the battle over what authentic gayness is, because, of course, I do not think there is such a thing. The question of framing this position or that position as not being sufficiently gay is deeply problematic. I think we just have to face the fact that the ideology and the identity are very different, and tell the world that and not try to persuade the world that either what we really represent is sexual freedom, or what we really represent is wanting to be married like everyone else is.

The second point is somewhat less obvious, and that is that the non-gay world is significantly more diverse and less monolithic than we give it credit for. It is true that a huge proportion of non-gay people are married at some point in their lives, but marriage has served as a mask for a lot of very untraditional behaviors. The unraveling of that that has accelerated over the last couple of decades, presenting us with an opportunity that I think we should not

pass up. In bringing our own very different traditions about relationships and sexuality to the broader cultural table, we should point out the ways in which the mainstream is more like us than is usually acknowledged.

One of the things for which we should call upon the non-gay world is not simply tolerance of us as L/G/B/T people, but also more honesty about themselves. Honesty about one's sexual life — I do not mean in a personal sense, I do not want the Lewinski issue to go on forever. That is not what I am calling for, but I am calling for thinking about ways to take more of the hypocrisy and dishonesty out of the presentation of non-gay life. I think there is more of a meeting ground there than we sometimes think there is. I think that an enormous part of the struggle of the right against us is also a struggle to try and maintain what is increasingly a kind of myth about what their lives are like. I think we ought to recognize that and try and use that to our advantage.

JUDGE BATTS: I am going to open this up now to questions from the audience.

AUDIENCE: Thank you for a very interesting morning touching on things that I have not thought of. Along those lines, in the last year I formed a friendship at work with a straight woman and one day she was particularly tickled when I said that in the gay community there is a derogatory term sometimes used for people that have children. They are called "breeders." She was enchanted by that because she and her husband, although married, have decided that they do not want to raise children. We have discussed that theme a number of times, and at the same time I became aware that there is prejudice in our society against women who choose not to raise children, and yet who choose to get married. I suppose it applies to men, although it probably affects women more. The issue of selfishness just occurred to me. The prejudice that that small segment of the straight community may suffer is one little aspect that we may want to take into this consideration of how we reach out to the straight community.

PROF. HUNTER: Your story reminds me of something I saw when I was watching the 1996 Republican convention on television. This was when Elizabeth Dole was walking through the audience and there was a color commentary about her. Someone mentioned, and I must say it absolutely stunned me that this could be said about a woman in 1996, that she had never had a child. She is not a mother. Robert Dole has a child and she is a step mother

to his child, but she never had a child. The newscaster thought that was relevant.

Your comment reminds me that it may be very interesting now that she has semi-announced a candidacy for the presidency, to watch how that issue develops, whether it becomes an issue, which it should not. Given that she is a Republican I predict it will, within the party if not more broadly. I think your point goes to the fact that although we often think in an easy or loose way about the family lives of non-gay people being synonymous with parenting, in fact they are not.

AUDIENCE: I wonder if you could comment on the role of the church in the debate.

MR. COLES: In the early 1990s I actually went around the country talking to people who had passed local gay rights ordinances to find out how they did it. Something that occurred to me early on is that when you get off the two coasts, religion is a much more important part of politics in America than it is anywhere else if you are going to have a cultural dialogue about who we are, and you are going to have a cultural dialogue about relationships to let the Church go is to give up what too much of the country is the most important and the most influential institution. That would just be completely suicidal and it ignores the fact that lots of people in our own community are people of faith who go to churches and take religion very seriously, and you have got to make religion part of the dialogue and part of the dialogue on our side.

MS. ETTELBRICK: Also, the Catholic Conference takes positions on pieces of legislation, both federally and in state government, and here in New York. We have worked very closely with Dignity chapters in talking with Cardinal O'Connor and other members of the Catholic Conference about moving them at least into a neutral position on things like the Hate Crimes Bill and the Sexual Orientation Non-Discrimination Bill, so there is a very pragmatic political reason that we need to hook up with those organizations like Dignity that can advocate from within.

JUDGE BATTS: Evan?

MR. WOLFSON: Well I agree with those comments and I think I will just add a couple others. One is that, in Hawaii and in Alaska, particularly in Hawaii, in the anti-marriage, anti-gay campaigns we just had to fight, the Mormon church and fundamentalist Christian groups threw more than $2 million into that campaign. They were by far the largest single contributors. They are our organized opponents, not the public at large. The public at large may

not yet support us, they may still be in need of being reached, but they are not the ones who are taking to the barricades, funding huge campaigns against us. It is these organized opponents who wrap themselves in the name of religion and to whom we cannot concede that name of religion. They should not be the voice of religion in America any more than any other single entity should be.

The second thing I would say is that affirmatively we should not concede that title. Many of us are religious. Many of us are moral. Certainly our cause is moral. What we are fighting for is moral. We are fighting for equality and the fulfillment of the American commitment to individual liberty, the pursuit of happiness and respect for all people. We are the moral ones and we should hold that. I mentioned the Sacramento ceremony in which more than ninety non-gay clergy made that civil rights statement. We should be holding, inviting and engaging those people in dialogue all across the country. Indeed, next week is the second annual National Freedom to Marry Day, on which we have called on people, gay and non-gay, in every community, school and entity to do something to celebrate, denote and redouble our outreach to non-gay people and, as of today, there are going to be more than seventy events all across the country, many of which involve things such as, inter-faith prayer breakfasts, statements by clergy, sermons in congregations, and so on. We should not, cannot and need not cede that arena, it is our arena, and what we are fighting for is right.

AUDIENCE: As I was listening to the panel's discussion, I was trying to figure out where the lessons were from the gays in the military. I am wondering, since marriage seems to be a similar kind of cultural issue, whether we are running against some mind sets. Could the panel talk about that and how are we dealing with the lessons?

MR. WOLFSON: Actually that is a question that a number of us have taken very seriously. There have been deliberate efforts to do this in a way to benefit from the experiences we had and the successes and weakness we had in our work. I do not really have time to go through all of them, but I will give you a few. One is that it is very clear that we are not going to win our civil rights, we are not going to win something as momentous as full equality — whether betokened by inclusion in the military — which is a hallmark of citizenship and also the large single federal discrimination — through one legislative "quick fix" or through delivery of our

rights by the courts alone. It is a sustained long term effort and we will not win if we do not sustain our energy and keep the momentum going, keep fighting and not get bored, tired or overwhelmed or decide we need to focus on a million other things. Unless we commit to serious long term fight for these issues, we cannot win.

Furthermore, contrary to the mythology that Clinton "created" these issues, we had been talking about these issues and bringing them into the courts for some time already. It became a matter of political and intense discussion. We went through this process with a good deal of division and uncertainty, and there was no clarity on exactly how the process should be handled. It was a good faith effort in many cases, but we were overwhelmed. It was a very short-term framework to do a lot of work, and in the end it could not be done. Virtually all the organizations, with the exception of the legal groups, were having problems, and it really failed at that juncture.

There was no follow through, however, no continued discussion, no effort to capitalize even on that failure. No one tried to leverage for people who had said, "well, the military is different," and turn it around and make a sustained, intelligent, persuasive argument about, "well, then what about civilians." We just did not do it right in that sense, and we cannot afford to repeat this with regard to the engagement that has broken out and with regard to the freedom to marry.

Another important lesson, I think, is that you can use that kind of political battle to engage public discussion and to reach people and educate them, but if you stop after just a few months, you will not get the "full bang for your buck," so to speak. We took this lesson seriously with regard to marriage. Long before it broke out politically and legally, we were doing a lot of work on the political front to try to shape the public dialogues, train the vocabulary and engage spokespeople and have it register, so that when the public began talking about gay people and marriage — something they had not talked about even a few years ago — they were talking about it largely on our terms, and when the backlash campaign, vicious and vigorous as it has been, busted out, we were more prepared to deal with it in advance than we usually have been. So those are, I think, two important ways in which we tried to benefit from the experience and move it forward.

MR. COLES: Let me suggest two others quickly. One from a narrow, parochial, legal approach. At the time the "Don't Ask,

Don't Tell" legislation[7] passed, Lambda and the ACLU tried very hard to think about this problem: in all previous military litigation we had seemed incapable of getting the courts to agree that the question was not about the inability of lesbians and gay men to be good soldiers and sailors, but it was really about other people's attitudes.

We went to great efforts to structure a couple of pieces of litigation to this end, which I think we did successfully in the *Able*[8] case and little bit less so in the *Phillips*[9] case on the west coast. The lesson out of those cases, as I read the way they came to their final circuit opinions, is that while we did succeed in getting rid of the ways courts had used to grapple with that basic question, what we got was essentially a stunning admission from the circuit courts that they do not really review constitutional questions when they come up in the military. Read Judge Noonan's opinion in *Phillips* or Judge Walker's final opinion in the *Able* case, and I think you will agree with me that this is what they come down to.

The lesson I take from these cases is that this was a necessary fight and I am glad we did it, but you cannot reasonably expect legal institutions, in most situations, to make social change way out in front of where the political institutions are. I think we need to remember this again and again in what is essentially a political movement. What arises from the military cases in federal courts is that when the courts are forced to look at these issues, they will take a bye on them.

MS. ETTELBRICK: Matt, would you distinguish the pre-"Don't Ask, Don't Tell" arena of military litigation from the past, because that is where the political structures had been decided through Congress? Do you think that it put courts in a different position in looking at this, because I seem to remember the feeling in the pre-"Don't Ask, Don't Tell" era was that through the slow whittling away of time, the courts would begin to come around to recognizing this policy as being discriminatory and the government's arguments upholding it were being chipped away very dramatically.

MR. COLES: That was not my sense during that time. The only thing that I suppose would give me that feeling would have been

7. *See* 10 U.S.C. § 654 (1999) (codifying policy concerning homosexuality in the armed forces).

8. Able v. United States, 88 F.3d 1280 (2d Cir. 1996).

9. Phillips v. Perry, 106 F.3d 1420 (9th Cir. 1996).

the *Meinhold*[10] case, but I thought the cases went better in the early 1970s than they did later into the 1980s and toward the end of "Don't Ask, Don't Tell" with the *Steffan*[11] case. No, I did not see great progress beforehand.

PROF. HUNTER: Well, I think there was. I am not sure that I would draw that time line distinction quite that way, but I do think that the cultural impact of the litigation was growing. I think that the *Watkins*[12] case had an enormous impact. It was a stunning moment when the Ninth Circuit panel ruled in favor of *Watkins* on equal protection grounds.[13] Although that did not last as a matter of law, it remains a stunning moment, a sign that something profound had shifted. I think that the *Steffan* case, although it produced nothing in terms of legal victory, was an enormously useful and powerful educational tool. I think that when Clinton was elected and announced his intention to lift the ban, our community basically ended up trying to surf a tidal wave. We were just overwhelmed by a whole convergence of factors in a situation that was pretty unique. I think that we collectively did the best we could.

One of the things that has interested me since then has been looking at the impact of that debate and the "Don't Ask, Don't Tell" statute on military policies covering non-gay members of the military. Over the last couple of years, there have been many controversies over adultery; often by high-ranking officers. These situations have caused a lot of grief in the military. Part of what has driven those situations has been their sense that prosecutions have to be fair. The services have been accused of applying a different standard for prosecution when the officer being accused is a woman or is African American. The military does not want to be seen as so flagrantly discriminatory in how they treat sexual conduct. They want to be able to say that they are going to apply sexual rules across the board. What happens when they do try and apply them across the board is that straight people find them ridiculous and insane. I think that the issue of military policy about sexuality is still completely up in the air and very much in flux, despite the demise of gay challenges.

MR. COLES: If you stand back and think about the hearings and look at this, even one step back away from military policy in general, the hearings were an enormous cultural step forward. We

10. Meinhold v. United States Dep't of Defense, 123 F.3d 1275 (9th Cir. 1997).
11. Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994).
12. United States v. Watkins, 875 F.2d 699 (9th Cir. 1989).
13. *See id.* at 711.

moved from an era of talking about lesbians and gay men as being incapable, being criminals or being mentally disabled. I think the hearings cut through all that with the entire country watching and essentially came down to saying, "Now the real problem is that you make us very nervous, so nervous that we really cannot do our jobs when you are around." That was ten years of political progress and I actually think that viewing "Don't Ask, Don't Tell" as a failure is a great mistake. I think it was a great cultural success.

We are still working out the details with policy, and I think that is going to take a while, but I honestly think that once you gain some perspective, the lesson we ought to take out of this is that this was a huge success from a cultural standpoint. Ultimately this is a battle to change the way people think about us and our relationships more than anything else.

MR. WOLFSON: I just want to say I agree with that and that was an example of advancement because we engaged in the battle. Where I think we dropped the ball was actually afterwards. We could have done things better but now we have learned and hopefully in the next battles we will do better. Where we have dropped the ball in the military question is we have not engaged in the continuing public discussion. Here we are now, in 1999, in Nan's famous formulation, where the breakthrough win of the freedom to marry, as she put it, either shimmers or lurks on the horizon.

We could still win that breakthrough within the next few months. The lesson that we should be taking from 1993 and the battle in the military is that we cannot just wait for these things to come to us through the "deus ex machina" of President Clinton or the state supreme courts or some cultural shifts. We should be out there mounting the barricades, building the bridges, engaging people and being prepared to withstand the battles in legislatures every day. If we are committed to seizing the most out of every single one of these breakthrough opportunities, be it the "Don't Ask, Don't Tell" hearings, the breakthrough win of the freedom to marry or horrible tragedies that nevertheless give us opportunities, like Matthew Shepard's death,[14] it is not enough to wait for them to fall from the sky. Every one of us, week by week, needs to be preparing to put ourselves in a good position to seize that luck and the challenge of doing that is directly presented around our freedom to marry.

14. *See supra* note 4.

JUDGE BATTS: Does anyone have a final question to put to the panel?

AUDIENCE: I work at the Asian American Legal Defense and Education Fund, and we do the traditional race-based civil rights litigation, and I personally do voting rights. I think we have done a lot of good work in the community on looking at coalition projects on legislation and public policy issues. What I have not really seen is the co–litigation that traditional civil rights organizations can do with L/G/B/T civil rights organizations through a litigation strategy. Now I know the body of law is radically different, and there is much more federal legislation that protects racial and ethnic minorities than there obviously are of the L/G/B/T communities. There have to be ways in which we can do more than just amicus briefs for the U.S. Supreme Court in support of each other's positions. I would like to know what your thoughts are on some co-litigation strategies between the different racial and ethnic civil rights organizations.

MS. ETTELBRICK: It does not happen very often, because that is where I first went in my thought. Years ago, I remember, there was a case of two women who were assaulted on a subway here in New York. They were a lesbian couple. They were latinas. It was very difficult to form a coalition in terms of different priorities that PRLDEF and Lambda had. Ten or twelve years ago, we had not yet begun to work together. You just cannot put people together over a piece of litigation if they have not tried to work out some of the issues beforehand. And most litigation does come up spontaneously or in response to something immediate that has happened to somebody. I think to work out some of the different perspectives in the course of representing a client or clients is often very difficult. I actually think the amicus brief approach is a very good approach as well, and I would be curious as to what thoughts you had of how it would enhance the litigation to do it jointly. Is it better to present to the court an intersection, or is it alliance building that can enrich each of the institutions later on to take on a new area of the law?

JUDGE BATTS: Anyone else want to respond to that?

MR. WOLFSON: I will just say that I think there has been increased resource and research sharing, and the amicus sharing that does go on is not just in the U.S. Supreme Court. There has been and there could still be more very important amici briefs that various combinations of groups have done with each other and I would not dismiss them as just amicus. I think that amicus briefs are an

appropriate use of the resources that the groups have. I would actually like to see us figure out ways that we can work together on the public education and outreach work around our respective legal work. I think our constituencies ought to better understand the intersection, whether through joint forums, letters or work. I do not know that it is so much what we can do as lawyers in court as what we can do as lawyers out of court together that would really benefit the shared commitments we have.

SEXUAL/GENDER IDENTITY IN THE CRIMINAL COURTS

MS. BADEN-MAYER: My name is Alexis Baden-Mayer. I am a third-year at City University of New York School of Law. Last summer, I was the Dr. M.L. "Hank" Henry, Jr. Judicial Intern. The "Hank" Henry Judicial Internship is a paid ten-week summer internship under the auspices of the Lesbian and Gay Law Association Foundation of Greater New York ("LeGaL"). The program is designed to give a student committed to lesbian and gay rights exposure to a variety of courts and tribunals through placements with openly gay and lesbian judges. The "Hank" Henry Fund for Judicial Internships was established in memory of Dr. Henry whose ground breaking work encouraged openly lesbian and gay lawyers to seek and achieve judicial office.

I would like to introduce the panelists. Judge Paul G. Feinman was elected to the Civil Court of the City of New York in the First Municipal Court District in November 1996, after winning a contested primary race. His election marked the first time that an openly gay male succeeded in being directly elected to the civil court. Since taking the bench in January 1997, he has been assigned directly to the Criminal Court of the City of New York for Manhattan.

Before his election, Judge Feinman served for eight years as the principal law clerk to the Honorable Angela M. Mazzarelli, Associate Justice of the Appellate Division, First Department, of New York's Supreme Court. During his tenure as Justice Mazzarelli's law clerk, he worked in the Appellate Division, both in civil and criminal trial terms in the Supreme Court and in the narcotics court, all in New York County.

Prior to working in the court system, Judge Feinman was a staff attorney for the Criminal Defense Division of the Legal Aid Society in New York County, and there he briefly shared an office with co-panelist Lori Cohen.

He began his legal career as a staff attorney for the Appeals Bureau of the Legal Aid Society in Nassau County, Long Island.

Judge Feinman is a former president and board member of LeGaL. He is a member of many bar associations and organizations and currently serves on the Criminal Courts Committee of the Association of the Bar of the City of New York and the Committee on Lesbians and Gay Men in the Law of the New York County Lawyers Association.

Judge Feinman received his law degree from the University of Minnesota in 1985. He was a research assistant in the area of comparative criminal procedure, a legal writing instructor and co-founder and past president of the Gay and Lesbian Law Students Association ("GALLA"). One of the legacies of his involvement as GALLA's president of the University of Minnesota was the barring of the military and other employers who discriminate on the basis of sexual orientation from conducting on-campus interviews in the Law School.

He graduated from Columbia College in Manhattan in 1981 with an AB degree in French literature and language served as a chair of what was then known as GPC — Gay People at Columbia.

Next, Judge Michael H. Sonberg graduated in 1968 from Queens College and from Harvard Law School in 1971. He worked for twenty years as a corporate attorney doing commercial litigation in practice in Manhattan. He was appointed to fill an interim vacancy on the Civil Court by Mayor Dinkins in August 1991, and re-appointed to fill interim vacancies by Mayor Dinkins and Mayor Giuliani. Appointed by Mayor Giuliani to the Criminal Court in April 1995 for a term ending in December 2001, he is the only openly gay or lesbian judicial appointee of Mayor Giuliani.

He has been in the Bronx Criminal Court since his appointment. He has been involved in the "Hank" Henry internship, and I had the pleasure of spending a week with him last summer doing arraignments. He has been nominated to serve a third one-year term as the Secretary of the Association of the Bar of the City of New York, and he is its first openly lesbian or gay officer. He has previously served as the Chair of the Committee on State Courts of Superior Jurisdiction and Co-Chair of the Council on Judicial Administration.

He is President of the Association of Lesbian and Gay Judges, a New York-based group, and Secretary of the International Association of Lesbian and Gay Judges. He is on the Executive Committee of the Harvard Law School Association and on the Board of the Association's Gay and Lesbian and Bisexual Alumnae Committee.

Next, Lori Cohen graduated from law school from the University of Buffalo in May 1986. She went to work at the Legal Aid Society, Criminal Defense Division, where she stayed for three years. Then she worked for a midsize firm, Mount Cotton & Willen. While there, she says she was "outed" inadvertently by the

New York Times in an article about a demonstration. They were discussing lesbian and gay attorneys and quoted her.

She said it was really not a big deal, as she had been out to everyone but the partners, and they were okay about it, she says, but not enthusiastic.

She left Mount Cotton in August 1989. At the time, she was representing the Safe Sex Six, the folks who had entered St. Patrick's Cathedral and engaged in an act of civil disobedience. Their trial was held in the winter of 1989, and although they were ultimately convicted, it was one of the first cases televised on "Court TV." Additionally, the defendants were sentenced to a lesser punishment than they had been offered prior to trial.

During the late 1980s and early 1990s, she represented over 5000 demonstrators from AIDS groups, lesbian and gay rights groups and reproductive freedom groups. In 1990, she started her own law firm with Karen Funk. They sought to start a practice that middle-income families, gay and straight, could afford. In that sense, they wanted to become the 1990s version of the small-town lawyer, the lawyer you went to when you bought your house, when you wrote your will, when your children got arrested, when your small business needed a contract to be looked at, got divorced, et cetera, and they have accomplished that goal. She specializes in criminal defense work and handles primarily pattern robberies and homicides.

This morning, at the roundtable discussion, Judge Deborah A. Batts asked the panelists how we, the queer community, choose our issues. Matt Coles responded by saying that first we look at where the harm is. I would like to ask our panelists, where are queer people being harmed by the criminal courts? In the processes of the criminal justice system? In discriminatory law enforcement? What are the harms that we can identify and how do we eliminate them?

MS. COHEN: I think the greatest harm, or really injustice, done to lesbians, gays, bisexuals and transgendered ("L/G/B/T") folks in the criminal justice system is that a lot of these alternative programs that are available to offenders are not available in any realm that would deal with issues that specifically affect gays and lesbians. For instance, same-sex domestic violence; there is a very popular batterers program where people who are convicted or accused of battering their spouses can go into the program, get treatment, and then usually have their cases dismissed or reduced. Those programs specifically do not accept gay or lesbian folks.

JUDGE SONBERG: And you would not want to send a gay or lesbian batterer to that program, because they would not come out in one piece.

MS. COHEN: There are several programs like that, which do not really deal with the issues of the gay and lesbian community. I think that is really where the biggest disservice to gays and lesbians are.

JUDGE FEINMAN: I agree with what Lori just said, but that is sort of a very specific issue in our time and place in New York City.

I think that if you broaden the question, you have to actually go and look at the very nature of consensual sodomy laws. While consensual sodomy laws have been falling state by state, slowly and surely, across the nation, the fact remains that there are consensual sodomy laws on the books in various jurisdictions. That is absolutely, in my mind, the greatest harm to our community, because it goes to the very essence of who we are, and it goes to the very essence of our most intimate relationships and it criminalizes them and it brands us as deviants, it brands us as non-persons, not entitled to any sort of equal protection under the law.

So to the extent that those laws still exist, they are extremely harmful, because it is then used as the underpinning for all sorts of other laws and unlawful discrimination.

JUDGE SONBERG: The statute is still on the books in New York, and I have actually seen it charged on a misdemeanor complaint. After they peeled me off the ceiling, it was not there much longer. I said, "Excuse me, do you know about *People v. Onofre*?"[15] The look was, "What?" I said, "Okay, it is before your time. It is 1980. The Court of Appeals declared this statute unconstitutional. It was dismissed." Surprisingly, I did not get an "Over the People's objection," because they figured they really better go read the case before they objected.

I think that in New York today the primary place where the criminal law intersects with L/G/B/T people because of who they are is in the domestic violence setting. I think that, to some extent, part to the problem is invisibility, because I have a sense that we do not always find out about the cases that are truly domestic disputes as opposed to disputes between people who know each other. You know, I will ask the question if I am doing an arraignment and I am told these are roommates or they are something — sometimes gaydar picks up — and the district attorney will say —

15. 405 N.E.2d 243 (N.Y. 1980).

JUDGE FEINMAN: "How did you know, Judge?"

JUDGE SONBERG: No, the district attorney will say "no." I say, "Is this a romantic relationship," and the assistant district attorney will say "no," and the defense attorney will say, "Well, can we approach" or "that is not my understanding" — because frequently, particularly with people of color, they do not want to give that up, even if they are the victim, to the police. They are not sure what the reaction will be if they have been assaulted and they tell the police that the person who assaulted them is in a romantic relationship with them, and they are not going to share that with the assistant district attorney who interviews them over a video hookup, because they are not going to think to ask the question.

And unless the defendant says "that is my lover" and the police happen to write it down and it is told to you, they will give notice of it as the statement they intend to use in their case in chief, you are not going to know about it when you are doing an arraignment.

I think we probably miss some number of cases, which makes the disposition a lot easier, because you do not have to worry about the absence of appropriate programs, because they are not pegged as a domestic violence dispute and, therefore, no one is looking to put the batterer in an alternatives-to-violence program. But it also means you are not addressing the problem.

MS. COHEN: That goes back to Paul's point. Members of our community are afraid of police in some way and afraid to identify themselves as L/G/B/T folks, because they are afraid of the reaction of the police. I think until we get that underlying fear or discrimination because of how we have been treated by the police out of society at large, we are going to always be faced with that problem.

MS. BADEN-MAYER: So how does it come down differently when the situation is not treated as a domestic violence dispute and it is just plain violence? Is there an advantage sometimes to the victim in those circumstances?

JUDGE SONBERG: Victim, no. For the defendant, yes.

MS. BADEN-MAYER: There is an advantage to the defendant?

JUDGE SONBERG: Absolutely, because if the injury is not serious — we are talking about soft tissue injury in all likelihood — they will be permitted to plead to a violation, get a conditional discharge, maybe a couple of days of community service.

JUDGE FEINMAN: Some of us do not generally give community service on assault charges.

MS. COHEN: Well, it is mostly viewed as a fight, a fight between people over some type of thing, as opposed to what domestic violence really is, which is a power situation between people who have intimacy, who are intimately involved. So it is treated much differently in the criminal justice system, because there is no feeling that there is an underlying need for treatment.

JUDGE FEINMAN: Very often, whether it is the district attorney trying to convince the judge to go along with the disposition so he can get his or her case out of the drawer and into the closed file, or whether it is a defense attorney, it will be pitched as, "Oh, it was just a bar fight," or "it is just a catfight between girls." You know, men and women suddenly become "boys" and "girls," even though they are adults in criminal court.

If it is pitched that way, it is going to be treated very differently than if it is pitched that this is about an intimate relationship where there are all sorts of complicated issues regarding economic power, control, access to the home, property issues and things like that.

JUDGE SONBERG: The converse, of course, is that when the police come, outing the other person can be part of the power play between people in an intimate relationship, and it all gets fairly complex. I know from a colleague of mine in Boston who is the President of the International Association of Lesbian and Gay Judges, Boston has wonderful protocols and training in terms of teaching law enforcement and district attorneys how to try to spot same-sex domestic violence. And I know that Anti-Violence Project ("AVP") certainly has done a lot here in working with the police department. But I do not have a sense that we have come to the same place.

JUDGE FEINMAN: It is not enough to just point the finger at the police. I think we have to also look at ourselves and the responsibility that we as a community have to create and demand awareness and training of the police, judges, prosecutors, defense attorneys and various counselors and providers. We as a community have to recognize that this exists and that we have an obligation to address it. It is very easy to just point a finger at the police and say, "Well, the police do not arrest or do not treat this the same." But, you know, we have a responsibility to demand it and to create a space in which people can actually address these issues without having to layer on the whole issue of homophobia.

One of the programs that Michael was talking about very specifically was this violence recovery program that is conducted in Boston by the Fenway Community Health Center. It is just a model

program, and we should be seeking to create things like that here in New York.

JUDGE SONBERG: One other thought that Paul provoked: The one place that victims do become disadvantaged is that where you have a woman who is battered so severely that she is at the point where she is prepared to move into a shelter. The shelters are for straight woman, so then you are talking about forcing someone to go into the closet if they want that relief, because they are just not going to be comfortable in most cases going into a shelter situation with other battered women who are going to talk about the man who beats them, where their situation is that they are being abused by their girlfriend.

And there are no shelters for men. There is no place for a man who is battered in a relationship to go to be safe.

MS. COHEN: A shelter probably is not the safest place for a gay man anyway.

JUDGE SONBERG: Right, unless there were beds for gay men. This is where you started to get beds for gay youth who were abused by their families. It is an analogous problem, with adults rather than teenagers and children.

MS. BADEN-MAYER: Is this the responsibility of the state, or are we, the queer community, going to have to create these programs and shelters ourselves?

MS. COHEN: I personally think it is the responsibility of the state, but I do not see this state under this administration doing that. I think the community would have to do it, just as they did in Boston.

MS. BADEN-MAYER: Could we use litigation to make the state responsible?

MS. COHEN: Well, the litigation is always a long process that deals with an answer in the future. I think we need an answer now, and I think it has to come from the community.

MS. BADEN-MAYER: Can you tell us a little about the violence recovery program in Boston at the Fenway Community Health Center and how it might be copied here in New York?

JUDGE FEINMAN: Well, I think that what you primarily need to do is you need to get a provider — and whether that is through the center or through something like AVP or Callen-Lorde, in essence, you need to get somebody who is going to administrate this, and they tend to involve training, education and counseling sessions, whether that is done in the form of group or individual therapy.

My only point in bringing that up was not so much to talk specifically about that program, but to sort of put out there that we as a community need to demand from the state — whether it is demanding from your legislators or demanding from your police department or your criminal justice system — that these issues be addressed.

It is a very real issue. Because I reside in New York County, if I am in an all-purpose part, where you see, let's say, an average of 100 to 150 cases a day in the course of one week, I will see at least one same-sex domestic case a week, and that is not an insignificant amount of cases, because I am only one of six all-purpose judges.

Essentially, what you are saying is in at least six cases a week, there is nothing out there to deal with these issues. I think you need to create a groundswell, whether that be by demanding from your local elected officials or through other agencies. That was my point only in referring to the Fenway program, that I think that it is something that came from the community.

MS. BADEN-MAYER: Are there any questions from the audience on this?

AUDIENCE: Yes, I have a question. I did an internship at the Legal Aid Society Criminal Defense in Manhattan, so the discussion comes out of that experience. It is, I think, a lot easier to talk about services in the intimate violence context than when the defendant has something else and I wondered what sort of things you have thought about or done for criminal defendants who were arrested on drug charges or something like that.

I am interested in transgendered people getting arrested, do they get their hormones while they are in jail; or if they have HIV, do they get their medications while they are locked up in the back and all that. Are there any protocols for that?

JUDGE FEINMAN: When I was at the Legal Aid Society Criminal Defense Division years ago in Manhattan, I remember a colleague of mine bringing a writ, heard by Judge Berkman when HIV sprang upon the scene in such a large way in the early-to-mid-1980s, and defendants were shackled to beds in the hospital wards and not getting any treatment whatsoever.

It has come a long way since those days. That does not mean that we are in a situation where it is ideal. The reality is that in a lot of the population that you see in criminal court, particularly with the substance abuse issue, you have people who are going in and out of the system constantly, and so you get to the whole issue

of being denied your access to protease inhibitors or other kinds of medications.

Then, you get into the whole concern about developing resistance, and I know that, as a judge, I am reluctant to give any sort of a jail sentence where you feel that there is going to be an inhibition of the person to get appropriate medical treatment.

On the other hand, we are assured by the Department of Correction that, in fact, if people have prescriptions or can make them aware of prescriptions, they will be given appropriate medical attention.

JUDGE SONBERG: You cannot say that everyone who has ever been a junkie and shared a dirty needle and has gotten HIV is allowed to go out and commit crimes and not be punished. That is the other side of it.

Within the last month I was arraigning a case, one I probably would have looked for a short period of jail given the defendant's fairly recent repetitive criminal history for the same offense, and the lawyers said, "He is HIV-positive," and I said, "So?"

They said, "Well, medication is an issue." I asked what the meds were. It helps to know — I do not think any of my non-gay colleagues would have had a clue — and the person was taking a cocktail. I was not prepared on a case that I probably would have been looking for ten days in jail, to take a risk on him getting an inappropriate medical regimen. In this case, I decided I would give this person a straight conditional discharge rather than the jail that I had pretty much decided was appropriate, given the offense and the record.

When it comes to more serious things, it is a situation where advocates from the community, rather than the court, really have to go and make sure that medical treatment on Riker's is appropriate, because there is a real public health issue; you do not want to be creating drug-resistant HIV. Because the chances are, particularly to the extent that we are talking about people who become HIV-positive through IV drug use there is going to be a dirty needle in his or her arm within days after release. That is just reality.

MS. COHEN: I think there are a couple of different issues.

One is the general health care issue of anybody who becomes incarcerated. I think we can all agree that health care to inmates across the country is at a woeful existence.

I get probably five to ten calls a week from colleagues who represent mostly teenagers at this point, who are involved in drugs or robbery — or whatever it is, shoplifting, grand larceny cases — and

they are gay and lesbian. The judges want to give them some type of alternative-to-incarceration program, and they want to know if there are programs out there that can deal with some of these issues.

Just this week, I had a gentleman call me. He had a young man who was very effeminate and was having a very difficult time in high school and had gone out and started shoplifting, and he had gotten arrested about five times in five weeks, and now he was looking at going to jail. The judge basically told him, "If you can find me some type of program that can address some of his issues, I will consider it."

There is not one specific program out there, but if you are willing to look and you can piece together your own program — we had him transferred to one of the gay and lesbian high schools. We had him start working with Hetrick Martin. There are ways and resources out there, but there are very few programs that deal with gay and lesbian issues.

There are, for instance, residential drug treatment programs that deal specifically with gays and lesbians. There are probably three beds available. If you take the time to find them and if you get the right judge — I have to say in New York County, you probably convince most of them — you can especially try to help a kid, somebody fifteen, sixteen, seventeen.

JUDGE FEINMAN: Every judge wants to believe that at that young age you can still make a difference in turning a person around and hopefully avoid a recidivism problem.

But there is a broader issue, which is that you do not have drug and alcohol treatment on demand, you do not have the ability to say, "Okay, what is going on here is a broader dysfunction in the family unit and I need to send the whole family to counseling to deal with the fact that they have a gay teenager."

Within the context of the way the criminal justice system has it set up and the limits on resources and the powers of the judge, there is only so much that you can do. I think that that is very hard to begin to accept when you start dealing with criminal justice issues for the first time.

There are only a finite amount of ranges of sentences. You have certain restrictions on what you can do and what your powers are. There is the ability to be creative, but part of it is what the legislature allows you to do or does not allow you to do.

JUDGE SONBERG: The other thing is that, other than same-sex domestic violence and transgendered, or incredibly effeminate

men, or someone with an HIV issue which the lawyers disclose to you — at which point I generally say to them, "Did your client authorize you to tell me this, or are you committing a Class E felony under the Public Health Law?"[16] — which makes a lot of jaws drop. After they have it in open court, I call them up and say, "I sure hope your client said it was okay for you to."

But other than those classes, I do not know who in front of me is lesbian, gay, bisexual, and in some cases I do not know if they are transgender.

That someone is L/G/B/T really does not have an impact on how I deal with the case unless it is relevant to the case, and certainly that is one of the issues that people first had when gays first came up through the appointive system before we started getting elected to the bench. One of the questions I am constantly asking myself over seven years, which I have not come to an answer, is what does it mean to be an openly gay judge?

I know that Dick Failla talked about his first interview at the City Bar Judiciary Committee when he was appointed. Dick Failla was the first openly gay man appointed to the Criminal Court in New York City. Someone named Bill Thom, who was one of the founders of Lambda Legal, had been appointed to a number of interim civil court vacancies, had run a couple of times and never gotten elected. Dick was appointed to Criminal Court and was the first openly gay person on Criminal Court, and then he was the first openly gay person elected to the Supreme Court. He died in 1993.

But when he first went through the process, you know, he got the same insulting, ignorant questions that I am sure that the early African Americans who were appointed to the bench got, and probably the first Asian Americans and Latinos, which is, "Well, how would you deal with a case if the parties in front of you are queer?"

JUDGE FEINMAN: I am sure they did not use that word.

JUDGE SONBERG: I am sure they did not. And the response is, "What in the world are you talking about? You take an oath to do equal justice, and the fact that you share a sexual orientation with a victim, a defendant, a plaintiff, a lawyer, is of no more relevance than if you share an ethnic heritage or a religious heritage or gender, you just try to be a little more perceptive on the criminal side in terms of a disposition if that is relevant to the disposition."

16. N.Y. PUBLIC HEALTH LAW § 2782 (McKinney 1999).

MS. COHEN: There are two stories, I think, that really show how far — I mean, we are sort of in Doomsday here now, but I think the criminal justice system has come so far even in the past twelve years that I have been involved with it.

The first is a story I heard at Judge Vela's memorial about how it was that he came out. He was a very prominent district attorney in New York County, and he was handling a homicide case, and the defense attorney said to him — and, of course, I have no idea if this is really true, but this is the story that goes around — "Listen, if you do not do this for my client, I am going to tell everybody that you are gay." You know, in this day and age, I do not see that happening. I do not see the Manhattan District Attorney's Office having that big a view on whether their assistants are gay or not — and in fact, they openly recruit gay assistants. So I think the attitudes towards the participants themselves have changed in the criminal justice system.

JUDGE SONBERG: In the Bronx there are either two or three openly gay assistants out of 400.

MS. COHEN: The other story is about a judge who was sitting in criminal court right when AIDS became a very big subject, and court officers would put on masks and gloves if they had to deal with anybody who they thought might have HIV or AIDS. The court officers approached the judge on the bench and they said to the judge, "Judge, we have this person coming in, he has AIDS, you know, we have the gloves, we have the masks; you know, what do you want us to do?" Court lore has it that she said to the court officers, "I want to arraign him, not fuck him; just bring him in."

JUDGE SONBERG: I did a jury trial the beginning of this year where one of the exhibits was a pair of bloodstained pants that the complainant was wearing when he was allegedly stabbed, and he was HIV-positive, and the assistant always put on gloves —

MS. COHEN: Well, I have seen that in trials where people are not HIV-positive. I mean, I think if I had to touch an exhibit that involved blood, I would wear gloves.

JUDGE SONBERG: Well except that, as a medical matter, the fact is that viruses do not live on fabric for weeks on end. I was not going to tell people they should not. But when I told the jury they could look at the pants in the jury room, I said, "We will give you gloves to wear if you want to handle this and you feel it is necessary," but I said, "My understanding of the science is that any bacteria or virus on the pants would not be an issue at this point." A little AIDS education, but it is a touchy issue.

AUDIENCE: Can you talk a little about whether you think the prosecution of public lewdness laws against gay men is just or unjust? I am not talking about illegal entrapment by the police or perjury or them lying about what they saw. I am just talking about the enforcement of the laws that are on the books in a way that does not involve misconduct on the part of law enforcement.

MS. COHEN: Well, let's be clear. The statute is the arresting of anybody. I mean, I think that gay men are proportionately higher.

JUDGE SONBERG: Depends where. In the Bronx, the bulk of the people I have seen on public lewdness charges are men who appear to be acting in front of women and in front of children, and not with other men.

MS. COHEN: Right. I was going to go on to say that there are large sections of the city that there are prosecution of public lewdness cases that clearly do not involve gay men.

MS. BADEN-MAYER: Could you make a distinction between a sort of "consensual" public lewdness and —

JUDGE FEINMAN: There is no such thing as consensual public lewdness.

AUDIENCE: I am talking about consensual public lewdness.

MS. COHEN: I do not think you can discuss it like that. I think it goes back to Paul's initial point, the criminalization in this society of consensual sex — whether it is consensual sex between a prostitute and her john, or whether it is consensual sex between two adults in a car, in a bathroom or wherever they may be.

AUDIENCE: Well, let's make it easier. What about sex in public restrooms?

MS. COHEN: Between two consenting adults?

AUDIENCE: Two consenting men, yes.

MS. COHEN: I think it is a waste of time. I think it is a waste of time to prosecute those people. But that is my own personal view, and I do not think either of these two gentlemen, since they sit on the bench, are either able under the law to comment on that or would like to comment on that, given that they may have to be reappointed some day.

JUDGE SONBERG: What happens if you are with your six-year-old nephew and you walk into the public john and there is what is sometimes referred to as a "weenie whacker" at the urinal. What message does that send to the child, and is not that something that society has the right to question?

MS. COHEN: I do not think the child notices.

AUDIENCE: Well, see, that is where I am coming from. I do not know what the statistics are or how disproportionate they are. And certainly, if it is a problem in public restrooms and society wants to stop that from happening for some of the very reasons that you mentioned, short of illegal conduct on the part of the police, I do not have all that much of a problem with that.

JUDGE FEINMAN: Built into the statute is the notion that it is actually public. In other words, if you are not doing this in a way that is exposed to the public, the case law is clear: if somebody is in a closed booth or something that is not public, then it is not public lewdness. So the whole nature of the offense, the way it is defined under the law, is that it is going to be in a way that is open to public view.

There is the famous case involving a heterosexual couple that went to the Court of Appeals —

JUDGE SONBERG: *People v. McNamara.*[17]

JUDGE FEINMAN: I remember cases by their facts.

JUDGE SONBERG: I cited it in a decision I wrote last year. So I remember the case.

MS. COHEN: They should just get rid of urinals.

I take my six-year-old nephew into the women's room, so I do not have that problem. But it seems to me that if we did not have urinals, there would be no one standing in a place where people can see them doing what they are doing.

JUDGE FEINMAN: That said, I just want to finish the point, which is that I think that where the judge plays the role in this is sort of, as in any case for any offense, reminding the parties of the role of proportional punishment. I am often put in the situation of having to remind young assistants, one of whom recently gave me a lecture about the moral outrage of public lewdness, that there has to be proportionality in sentencing and that very often, for a lot of gentlemen that I see, particularly gay gentlemen who come in on these kinds of offenses, is that the stigma of the initial arrest is sufficient punishment and that you will not see them as repeat offenders.

So you try to work out a disposition that will result in a non-criminal disposition. Perhaps it is adjourned in contemplation of dismissal or something of that nature. What I find offensive sometimes is that they will ask for a punishment that is actually more severe than what they recommend in some first-arrest assault

17. 585 N.E.2d 788 (N.Y. 1991).

cases. That is part of the judge's role, to make sure that there is proportionality and that there is balance in how offenses are treated.

JUDGE SONBERG: Yes, and one of the other pieces of it is that there is literature that suggests that men who masturbate in front of women is someone who has a high risk of going on to commit other sex offenses. What are you going to say: "If you can prove you are gay, it is one offense, and if you are not gay that it is something else?" One of the nice things about the criminal law is that things that seem easy on their face, when you start probing, frequently end up being far more complex.

AUDIENCE: I was going to mention that I think it is a great opportunity for parents when they take their children into public restrooms to begin teaching them that when you go in a public restroom, you mind your own business and you do not involve yourself with what other people are doing.

Also, they should ignore what is going on in closed booths, because there are a lot of activities that go on in public restrooms and parks — drug use, dealing, that sort of thing, various other unsanitary conditions — that children should learn to go into a restroom, do their business, and leave.

Secondly, I was going to mention that most of these cases are — they are the perfect case to be adjourned contemplating dismissal. Most prosecutors, community officers, do not follow up on these cases.

JUDGE FEINMAN: Well, they definitely follow through in New York County. Do not think otherwise. It does take the involvement of the judge to get an adjournment in contemplation of dismissal. The standard offer of the New York County District Attorney's Office on a first arrest for public lewdness is disorderly conduct, which is still a conviction for a violation, and a sentence of a conditional discharge with some community service. It often requires going to a bureau chief. It requires going over the line assistant's head, because it is a so-called departure from the guidelines. But it can be done, and it is done fairly regularly. It just takes a little pushing.

That said, you know, I have had occasion to have people who — I had one gentleman who was arrested four times in the same restroom, and my position was "I am not going to bat for you; you did not get the message the first time. Sorry."

AUDIENCE: I am interested in the issue of people who have been victims of assailants as the result of their gender identity.

Where I am from, in El Paso, Texas, that happens a lot. Pretty little boys get picked up by people who appear to be gay-friendly, and then they wind up in the hospital for two weeks with two broken legs and a broken arm, and nine months later their assailant walks. So I am just interested in what is going on here in this court system in those sorts of circumstances.

JUDGE SONBERG: We have a hate crimes law that does not address sexual orientation. My experience — and I have only sat in the Bronx — is that if the case as it comes in clearly has a bias basis, and it does not have to necessarily be a statutorily-recognized bias basis, that the District Attorney's Office deals with it differently than they would deal with another stranger-on-stranger assault. If there is language used — you know, if you have a case where there is no language that is used, if there is nothing on the case that says this is a bias-based attack, if you do not have the basis for it, you cannot talk about it.

But on the ones where there is language or there is something in terms of the conduct, the nature of the assault is such that it is clear that there is a sexual undercurrent to the crime, that they deal with it that way and treat it more seriously than they would.

JUDGE FEINMAN: That being said, I think it is important not to underestimate the importance of victim advocates in this situation. It would be dishonest of any judge to tell you that they do not notice when their courtroom is full at sentencing.

JUDGE SONBERG: Victim advocates do not come to the Bronx.

JUDGE FEINMAN: Or that if the AVP has submitted a memo on behalf of the victim — by statute in New York State, every victim is entitled to make a victim impact statement.[18] What you often see, on felony, but even on the misdemeanors, the probation department — if you are talking about a situation where there has been a probation report, it will always include a so-called victim impact statement, and what it usually says is "complainant not reached."

MS. COHEN: Or the DA does not allow.

JUDGE FEINMAN: DA may not also allow, or whatever, the file or the information as to how to reach the complainant. I can think of at least two situations where I ordered an updated probation report because I wanted to know what the victim had to say. In particular, in one situation, the reason I was alerted to the whole

18. *See* N.Y. CRIM. PROC. LAW §§ 390.20, 390.30, 440.50 (McKinney 1994).

issue is because there was a letter in the file from the Anti-Violence Project. So those kinds of organizations play a crucial role in at least flagging the case to the judge, identifying that that is an issue that has gone on.

Defense lawyers are not going to tell you that. They should not tell you that. That is not necessarily their role. The prosecutor should tell you that. That is their job.

So I cannot underscore enough the importance of groups like AVP and other victim advocates groups, whether it is based on gender or on sexual orientation.

On the whole issue of gay-bashing cases, I would have to say, quite honestly, in my experience in New York County, that I have never personally encountered a situation where a defense of homosexual panic or anything like that that was successful. I mean, I do not know if that is part of what you are asking.

MS. COHEN: We have not seen many of those. I cannot recall any.

JUDGE FEINMAN: But that does not mean that it does not happen or that it is not an issue.

MS. BADEN-MAYER: Is it technically possible under the law of New York State to offer —

MS. COHEN: Anything is technically possible under the law.

When you are representing a defendant, you could try to make any argument that you think the jury will buy. I have, in twelve years, never seen that defense used and certainly never seen it used successfully.

JUDGE FEINMAN: In yesterday's *Law Journal*, somebody made the argument in a prostitution case that there can be no prostitution in same-sex relationships, because there is no sexual intercourse, as defined in the law.[19]

MS. COHEN: It is the "Bill Clinton theory."

JUDGE FEINMAN: There the defense attorney is basically relying on this concept of deviant sexual intercourse. In yesterday's *Law Journal* this judge wrote a decision which basically said "that is an outdated concept; we are not going to have any of that."[20]

But the point is that it is up to the judiciary to sort of put the brakes on those kinds of arguments and move us along.

JUDGE SONBERG: See, we could try to get the State Legislature to amend the statute and change the term from deviant sexual intercourse to alternate sexual intercourse.

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19. *See* People v. Medina, N.Y. L.J., Feb. 5, 1999.
20. *See id.*

AUDIENCE: I was just curious what effects you see sexism and homophobia having on defendants who are either queer or perceived as queer in their sentencing.

JUDGE FEINMAN: One of the myths about domestic violence in L/G/B/T communities is that the batterer is always bigger, stronger or more butch; victims will always be smaller, weaker and more feminine. The reality is experience with heterosexual battering and attitudes about traditional sex roles lead many to fall into stereotypes of how batterers and victims respectively should look now.

Unfortunately, such stereotypes are of little actual use in helping us to identify who the batterer is in a same-sex relationship. A person who is small but prone to violence and rage can do a lot of damage to someone who may be taller, heavier, stronger, and nonviolent. Size, weight, masculinity, femininity or any other physical attribute or role is not a good indicator of whether a person will be a victim or a batterer. A batterer does not need to be 6'1" and built like a rugby player to use a weapon against you, smash your compact disc, cut up your clothing or tell everyone at work that you really are queer.

Sometimes you need to as the judge or the prosecutor or the defense attorney, say, "Wait a minute. You know, let's not just go based on what gut reactions and stereotypes might suggest."

JUDGE SONBERG: And you are just seeing — generally, you are just seeing the defendant, you are not seeing the complainant. And sometimes you may think that you have the most butch lesbian you have ever seen in front of you as the defendant, and for some reason the complainant will come in the next day, and she is not only as butch, but she is six inches taller and 100 pounds heavier.

MS. COHEN: You mean on any kind of case where — I mean, I have seen enough butch women, some of whom are gay and some of whom are not gay, that it really does not — I do not think it has that great of an impact, what a person looks like.

JUDGE SONBERG: I think judges have learned, certainly in New York City, that people come in all shapes, sizes, colors and permutations. I think there is a lot less giggling and discomfort with transgendered people than there was five years ago, although that is probably still the one place that there is the largest problem of homophobia in its broadest sense. I think people have pretty much figured out that you cannot tell a book by its cover.

MS. COHEN: That is not to say that sexism is not alive and well and flourishing in the criminal justice system, because it is. I think in that way it almost helps female defendants, whether they are butch or not. I think they are almost always treated more lenient than male defendants. I think sexism also affects the way female lawyers are treated. I mean, I think sexism is very alive and well.

AUDIENCE: It seems like — maybe not necessarily in New York, but overall — that in a lot of the more violent types of crimes that women are sentenced heavier, though, to teach them a lesson.

MS. COHEN: I have not experienced that. I have not experienced that in New York nor in most of my readings.

MS. BADEN-MAYER: I will ask the panelists if they do not mind taking one more question.

AUDIENCE: What is your opinion — for example, I know a lot of cases where a straight family woman married with two, three or four kids comes before a judge, and she has a favorable probation, pre-sentence report. She has a husband present in the courtroom. She gets a lesser sentence, and she is more likely to get less bail and to get only parole and to be treated very leniently, as opposed to a butch woman who has no friends in the courtroom but a bunch of gay people — she is less likely to —

MS. COHEN: Absolutely. I think that is absolutely true. I think that evolves out of society's own bias about families. "Families equal stability, stability equals the fact that you are going to come back to court." I do not agree with it. I think that you can have —

AUDIENCE: What can we do about that?

MS. COHEN: We can change the way society views our relationships, the way society views our families, the way society views our community.

MARRIAGE: WINNING AND KEEPING THE FREEDOM TO MARRY NATIONALLY AND IN NEW YORK

MR. WOLFSON: I am Evan Wolfson, Director of the Marriage Project for Lambda Legal Defense and Education Fund. What we are doing in this panel today is trying to go beyond the general discussion we had in the earlier panel and talk specifically about how we — "we" meaning you — can win the freedom to marry, both nationally and in New York. You have heard me say things like this "freedom is within reach." The breakthrough is possible. We can see the opportunities come within a matter of months. There is obviously no guarantee in law or civil rights or history, but this breakthrough possibility is real, it is urgent, and it is imminent, and the opportunities for engagement are real, present and compelling.

Given that, what can each one of us do to really make this happen, not just in our lifetime, which a few years ago seemed like it would not even happen, but within the next few months and years? How do we do that? How do we do that in New York? How do we do it nationally?

To begin answering those questions and to engage you on how to get involved, we have an incredibly distinguished group of people here. I will just identify them very briefly. Tim Sweeney is Deputy Executive Director of the Empire State Pride Agenda, and Tim is also a very long-term activist. He began when he was eight and has been working for this community and this set of communities ever since, in a range of very important positions across the board, with regard to the concerns and civil rights of lesbians, gay men, people with HIV and AIDS, and others.

Patty Penelosa is the chair of Marriage Equality, which is New York's grassroots marriage, education/marriage, outreach/marriage, organizing organization, eagerly awaiting your involvement.

Peter Sherwin is an associate at Proskauer, Rose, Goetz & Mendelson, and, in addition, is chair of the City Bar Committee on Lesbians and Gay Men in the Legal Profession. Peter is also the author of the Bar Association's Report[21] taking a position in favor of gay people's freedom to marry, declaring what the law in New York is and that it ought to be in our favor with regard to equality on the freedom to marry, and he is leading the committee in efforts to move it forward.

21. *Same-Sex Marriage in New York*, 52 REC. ASS'N B. N.Y.C. 343 (April 1997) [hereafter Bar Ass'n Report].

Peter, can you very quickly tell us what is the state of the law today in New York State with regard to the freedom to marry?

MR. SHERWIN: Well, the state of the law is actually pretty good. There is a very nice foundation that is somewhat unique to New York.

Let's first mention the statute. A lot of states have statutes that expressly require a marriage to be between a man and a woman. New York does not have such a requirement.[22] It talks about parties; it talks about individuals. It is more of a regulatory framework, rather than one that sets out and defines marriage.

So if you look at the domestic relations law in Article 3, we have a gender-neutral statute from which to work.[23] That is a great foundation, because we can argue to the court that it needs to apply the statute in a gender-neutral way in order to avoid constitutional infirmities, which it may never have to reach.

What else do we have to support us? We have some pretty good public policy pronouncements by the New York Court of Appeals. We have *Braschi v. Stahl Associates*,[24] which came down in 1989 and recognized that, for the definition of family, we were going to include same-sex domestic partners. That was a great step forward. We have *In re Jacob*,[25] that says we are going to allow second-parent adoption, whether that is by two parents of the same sex or opposite sex, when it is in the best interest of the child, without having to — as was a requirement before — cut off the parental responsibilities of the maternal parent.[26] So that was great.

We also have something that was not that wonderful: *Alison D. v. Virginia M.*,[27] which predates *In re Jacob*. There, the court of appeals considered visitation rights in the context of a lesbian couple who had broken up. They had had the child together, but the court's problem was basically that, because there was no formal family tie between the couple, it was not going to award visitation to a "third person."[28]

So all in all we have good public policy in New York.

Evan mentioned the Report that was published by the City Bar.[29] If anybody wants one of those, you can certainly get it

22. *See generally* N.Y. DOM. REL. LAW (McKinney 1988).
23. *See id.* § 10.
24. 54 N.E.2d 49 (N.Y. 1989).
25. 660 N.E.2d 397 (N.Y. 1995).
26. *See id.*
27. 572 N.E.2d 27 (N.Y. 1991).
28. *Id.* at 656.
29. *See* Bar Ass'n Report, *supra* note 21.

through your law library. I do not know if it is available online, but you can always call me at Proskauer, and I will send you a copy.

We also have some good law in New York for the recognition of sister-state, same-sex marriages. If this happens in Vermont, we are well poised in New York for recognition of a New York couple who had gone to Vermont, gotten married legally in Vermont, and now want to have it recognized in New York. Basically, New York has only voided a marriage as contrary to New York public policy when it was polygamous.[30] All the other types of marriage that New York itself does not recognize if you try to engage in within New York, New York courts nonetheless will recognize if they occur outside of New York and were lawfully entered into in that other state. We are talking about consanguinity, proxy marriages, common law marriages and all sorts of other things that New York itself does not allow but nonetheless will recognize. So that gives us heart.

What is going on right now? Where are we today? There was one challenge in New York to an overtly same-sex marriage. That was up in Ithaca, Tompkins County, and it is a case called *Storrs v. Holcomb*.[31] The court held that it did not violate the Constitution for this statute to apply only to opposite sex-couples. It went up to the Third Department, and the Third Department — on a procedural issue — dismissed the case, saying that you cannot just sue the County Clerk of Ithaca; you have to include the State; you have to include the Department of Health, which is basically the State.[32] That case has not yet been re-filed, but who knows, it may be tomorrow.

Also, we have anti-same-sex marriage legislation that is pending. There are bills in the Assembly, and in the Senate, and they could be passed. Such legislation has been there in previous years, and so far it has been successfully avoided. But who knows what will happen this year.

That is basically what is going on.

MR. WOLFSON: Okay, let me just question you on just a couple of points. You gave the positive version, how we will argue as advocates when we are litigating, either an affirmative challenge to allow people to get married in New York or — and I think it is important, as you point out, to remember these are two separate and important arenas — once we achieve the breakthrough some-

30. *See id.* at 355.
31. 666 N.Y.S.2d 835 (App. Div. 1997).
32. *See id.* at 837-38.

where to defend people's lawful marriages against discrimination or non-recognition by New York when they come back home or travel through or go to school or whatever.

It is also true that there have been cases in which courts at lower levels have opined in other settings that gay people do not have the freedom to marry in New York or that same-sex couples do not have the freedom?

MR. SHERWIN: That is true, and the two cases that come to mind immediately are from the 1970s. I actually think that they are relatively easy to distinguish, although on their face they say that New York does not recognize, and the current law does not allow, same-sex couples to get married.[33]

But the distinguishing factor there is that it was a mistake. One woman went out and thought she was marrying a man and it turns out, after they were married, that her husband was actually a woman. The opposite thing happened as well: A man went out, got married to this woman, and got her home and found out that she was a man. The courts say we are not going to recognize this marriage, and they do not just go on the mistake premise; they also say as a matter of law this cannot be recognized.

Those cases are from the 1970s. Things are changing on the court of appeals. Granted, we have to deal with those cases, and they are out there. Also, because the statute itself only talks in terms of regulating rather than defining, there are obvious arguments that could be made for construction about what the Founding Fathers were thinking at the time they were drafting the statute. And there are one or two sections where they do talk about what the bride and what the groom have to do.[34] We can try to overcome them, but they do exist.

MR. WOLFSON: On the statutory silence point, you correctly said that New York's law is silent. I often get calls with people asking, "Well, if it does not say we cannot get married, why can't we just walk into court and do it?" Although that is an appealing argument, and one that will obviously be made in litigation down the road again, what has been the fate of that argument in courts that have looked at it in New York and elsewhere? Have the courts accepted the argument that the statute does not specifically say a man and a woman; therefore, go ahead?

33. Frances B. v. Mark B., 355 N.Y.S.2d 712 (Sup. Ct. 1974); Anonymous v. Anonymous, 325 N.Y.S.2d 499 (Sup. Ct. 1971).

34. *See, e.g.*, N.Y. DOM. REL. LAW § 15 (1)(a).

MR. SHERWIN: I do not know if I am the best person to speak to that, because I do not know a lot about what is happening outside of New York State. In *Starrs v. Holcomb*, the court basically glossed over the plain language of the statute and went directly to the constitutional argument. It found that this is subject to rational basis scrutiny and found *sua sponte*, that there is a rational basis for not permitting same-sex marriages.[35]

One of the things that the court in Ithaca based its decision on, and we can expect to see in the next challenge that comes in New York, is the Department of Health's pronouncement. Previously, Ithaca's City Council had said "we don't see any reason why this marriage should not be allowed, so why do not you [the County Clerk] let them get married?"

The county clerk, to find out whether or not she is allowed to do this, wrote to the Department of Health, which is basically her employer. The Department of Health wrote back a very simple, one-and-a-half page opinion and did not talk about the statutory language at all. I focused only on *In re Cooper*,[36] which was an appellate decision and it was in the context of not whether or not the marriage statute is gender-neutral, not whether or not same-sex individuals can get married, but it was for the definition of spouse in — what was the context, Evan?

MR. WOLFSON: In the Department of Health?

MR. SHERWIN: No, in *In re Cooper.*

MR. WOLFSON: Oh, it was in spousal share. It was a spousal share question. It was an estate question.

MR. SHERWIN: An estate question. So it is not very well premised, and not well reasoned. And one of the things that we can go out and do, and we are in fact now trying to do, is to get the Attorney General to overrule the Department of Health's pronouncement and give us a better foundation for litigation, or at least to knock that foundation out.

MR. WOLFSON: Okay, that is the litigation side.

Peter acknowledged that there is an anti-marriage bill pending.[37] The Pride Agenda has, for several years, worked hard within the Legislature to block New York's version of the anti-marriage bill, a version of bills that we have seen launched in all but one state over the last three to four years.

Tim, what is happening with the anti-marriage bill in New York?

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35. *See Starrs*, 666 N.Y.S.2d at 837.
36. 592 N.Y.S.2d 797 (App. Div. 1993).
37. S. 5228, 222d Legis. Sess. (N.Y. 1999).

MR. SWEENEY: It is back. The bills up in Albany have a two-year shelf life. So they have been reintroduced. This is what is called the new legislative session. There is a copy of the bill over here on the table, and the Assembly version has been put out.[38] It has been introduced by our dear friend, Assembly Member Tony Seminerio, a Democrat from Queens, which is all of two miles from here, I would like to point out. So this is not beyond our reach, folks.

Let me tell you what has happened with the legislation over the last four years. It really has not gone anywhere. There is a companion bill to this in the Senate, which is by Senator Serphin Maltese from Queens. These do not have a lot of sponsorship.

This issue has not taken off in the legislature because the political clout of the gay and lesbian community and our allies is such that people see this as a real problem. Even if they are not sure about whether gay and lesbian people should get married, they do not particularly want to anger a very well-organized community. That depends on whether we in fact are well organized and get out and vote, whether we do what we need to do to make our presence known.

What I am going to try to get you to do is to think like you are in Albany and you are a legislator. We have a legislature up there that is far more conservative than people understand. If you have never been up there, you would be shocked at how conservative these people can be, and the relative clout of New York City has diminished over the last decade up there.

Where before we might have been able to look at a legislature that would just say "bills like this are dead on arrival," that is not the case any more. If any of you have followed, for instance, HIV legislation and watched what happened with the partner notification bill this last year, they used to be able to say to us, "Do not worry, it is dead on arrival, it is never going to go anywhere." But last year they crumbled, and that thing went through, in spite of the fact that there was a huge number of people in the Assembly who were opposed to that bill.

What does that mean we need to do? Over here on our right-hand side, there is something called an in-district lobby form. There is one way we can stop this bill if it starts to move in Albany. The first thing to remember is everything in Albany is controlled by the leadership. The governor, Speaker Silver in the Assembly

38. A. 594, 222d Legis. Sess. (N.Y. 1999).

and Senate Majority Leader Joe Bruno control the entire game. This is not an open democratic process up there. They literally can open and close the process at whim. That makes those three players very critical. So let's analyze what we have with each one.

Let's start with the governor. We need to send a very clear message to this governor, who thinks he is running for Vice President or President, that if he should see this bill move, we will cause such a firestorm and embarrass him nationally as much as we possibly can, just when he is out doing the chicken circuit, giving speeches out in South Carolina to Republican primary voters. We are going to have people hounding the hell out of him back home, embarrassing him, pulling him back, and what we need to do is make very simple commonsensical arguments.

What we find when we do polling on this issue is that Americans are deeply divided over this issue. We need to exploit that division. What politicians do is wet their finger, put it up in the air and try to decide which way the wind is blowing. I am telling you right now, what the polls are going to say — "do you think gay people should have the right to get married?" — the wind is going to blow in the wrong direction.

Let's reframe that question. The minute you reframe the question, we can give a lot of pause to legislators who might want to jump the wrong way. If you talk about Social Security, inheritance, taxation, health benefits, sick leave, funeral leave, real concrete things that we need in our lives, whether it is economic benefits or relationship benefits when we have a partner, you see that support for those can go as high as eighty percent of Americans who think that gay partners should have the right to Social Security and health benefits. We have very strong support.

What we need to do is reframe the issue, getting away from any sort of religious context, getting away from any comparison — "are we trying to be morally equivalent to heterosexual marriage" — and all those things that people get all wrapped up about which are really to our detriment most of the time. Instead we really need to focus on some of the economic consequences of the discrimination that we face.

When that happens, we see numbers of legislators say: "I think this antigay marriage bill is mean, it is intolerant, it will promote violence, it is not necessary; just leave it alone."

What we found right now is in the Assembly — which is going to be the key battleground for us; the Assembly is where we are going to stop this thing cold — Joe Bruno, in the Senate, has the votes to

pass the antigay marriage bill, and believe me, he will ram that thing through if he needs to. He is very good at that.

But, thank God, this year we have the first openly gay State Senator, Tom Duane, and a number of very good allies in Senator Dan Hevesi and Eric Schneiderman, who I think are going to cause a real problem, rather than just roll over and let Joe Bruno do what he is going to do. We are going to exploit the opportunity and have a big education campaign around marriage, because that is the only thing we can do in a crisis — try to make an opportunity.

What do I mean by an "education campaign?" The vast majority of people, when asked, think that gay people can get married. They do not know. They watched an episode of "Friends," saw two people get married, and conclude that gay people can get married. They do not have a clue about our lives. We need to bring down to reality these sort of questions, and we have someone, our legal intern, here. We have done a series of Q&A things — and Patty is going to talk about this in a minute — that literally start at the beginning with people, because they do not have a clue.

They do not know we do not have any civil rights in New York, civil rights protections in employment, housing and public accommodations. They have no idea we do not have a hate-related bias and violence bill. They do not have a clue about where gay and lesbian people are at. They get everything that they know about us from television. You can go there if you want to, but it is a little frightening. You know what I mean?

So what we need to do is walk them through the reality of our lives and the reality of where the law is with us. I think that we have a chance, if we put up a storm in the Senate, to try to drag the bill, to make Joe Bruno pay a price, to educate the public, and basically have sort of a nucleus of the State Senate say, "Look, this is a wrong, mean, intolerant thing to do." Then it will slow down the vote and perhaps give us the opportunity to stop it in the Assembly.

Now we have about forty-five votes in the Assembly as it exists right now. We need a solid ninety. The Pride Agenda is organizing these in-district visits. We are doing more than one hundred of them in the next eight weeks. We have already started with people all over the state. I cannot stress to you enough that going to see your legislator in their home district and looking them in the face and saying "do you really want to make me a second-class citizen; do you really want to do this mean and intolerant thing?" — and describe very concretely and emotionally, if you need to, what this

bill means to you — will stick with them. It will give them the guts to do the right thing. Most of them want to vote against this bill, but they need a collective group to go into their speaker and say "do the right thing; keep the backbone; we are not going to pay the price at the polls."

The Pride Agenda's strategy on this all along is to be very involved in what is called "marginal Democratic seats in the Assembly." We go with a woman like Debra Mazzarelli out on Long Island. She switched from being a Republican to a Democrat. She is this amazing woman. She quit the Republican Party because they were homophobic and sexist, and she told them that, and you can imagine how that went over in the Republican Party.

Well, we went there and stood with her out on Long Island. She got reelected by a huge margin. They put tons of money against her and did not touch her. That is the kind of person that Sheldon Silver is worried about, that if in fact we defeat the antigay marriage bill, the Republicans are going to pour tons of money — and believe me, they outspend us in this state about six-to-one in elections — and will take out anywhere from twelve to twenty-four of these marginal Democrats; they will go Republican, and for the first time they will in fact control the Assembly.

That is the worse-case scenario, and that is the mindset of Speaker Sheldon Silver that we have to change and say, "Do not worry about it. We, as people meeting and working in those districts, will make sure that the people that stand with us will not be defeated at the polls in the year 2000."

It is a good year in 1999 to have this vote, because there is no election in November. For politicians, their worst nightmare is, "Oh my God, I am going to have to deal with this vote in six more months." At least they do not have to deal with this vote until November 2000. But we really, really need your help to do these in-district visits. I am telling you, we can win this fight. New York has a shot to help stop this avalanche of legislation that is going state by state. The fact that it has not moved is good.

So we need to do three things:

(1) We need to make this a big problem for George Pataki's national ambitions — and, believe me, the last thing that man wants is this battle going on in his state. If we just make that real clear to him, I will bet he will say to Joe Bruno "just bury the damn thing; I do not want to talk about it," which would be fine by us.

(2) We need to cause a stink and do a big education campaign and make our state senators, who are going to have to vote against

this thing in probably a losing vote in the State Senate, do a good education campaign and help stiffen the spine of Sheldon Silver.

(3) Last, we need to get the progressive majority of people that are in that State Assembly to say to Sheldon Silver: "Do the right thing. Be a leader. Defeat this bad bill."

MR. WOLFSON: Okay, Tim, let me just ask you, quickly and specifically, if people in this room call you up on Monday morning in your office and say, "I want to volunteer a little time; I am a law student and I do not have a lot of time, but I have a little time. I want to work with the Pride Agenda to stop this bill, but I live in a district that is represented by Tom Duane and Deborah Glick, so I do not know that I need to do the in-district visit" and you say, "Well, go visit that person, but that is an easy sell; we are pretty comfortable with her or him" — what else can they do? How would you put people in this room to work?

MR. SWEENEY: There are two things. Never forget there is no such thing as an easy sell. I do not even care if you call Deborah Glick six times and remind her that her job is to go to Shelly Silver and say "for my community, stop this thing, you owe this to me. Not housing, not development, not whatever other issue I had — this is the top priority. Stick with this."

What often happens is we get caught in all the trading that goes on. Well, this cannot be a trade. We cannot go down the tubes because someone decided there is some other issue that is more important. Never assume that Dick Gottfried, Deborah Glick and all the rest of the liberals on the West Side do not need to be reminded about this. Every one of them needs to be reminded.

Make the call and make it clear. Be clear that we vote and we can vote them out if they do the wrong thing. And, believe me, they heard that in the Chuck Schumer/Alfonse D'Amato race. They see us as the sleeping giant who has woken up. They are a little nervous about us, and that is exactly where you want a politician.

Secondly, we can use you to do phone banking and visits to other politicians. This last year, we did about 15,000 calls on the sexual orientation nondiscrimination bill. What we need to do is if Vermont comes down and Serp Maltese and Joe Bruno stand up in the Senate and start their little heterosexual swagger about, you know, "Let's put this marriage thing to bed, we need to get 10,000 calls into Governor Pataki the next day."

We can do it, and I know that is boring scut work, but that is what organizing work is. That means you pull out your little black

book where you keep all your addresses, and you call every one of your friends, and you say to them: "Make this call. It takes exactly one minute of your time." What they do in Albany is literally keep a little checklist, and what they did on the sexual orientation nondiscrimination bill when we were bothering the hell out of D'Amato last year is pretty soon we had the lines tied up for days at a time. They would answer the phone and they would say, "Hello, Governor's Office. Are you calling about the sexual orientation nondiscrimination bill?"

That is exactly where you want them. That is our grassroots version of a poll and a vote. If they think there is such a storm around this, they will want it to go away. They want to be nice to you. They want to give you money and make you feel good and make you vote for them. But if you are screaming at them through the phone lines, which is what we need you to do — and I am talking e-mail networks, any way you get word out to the people and the people get a word up to Albany or back to their in-district offices — I am telling you, we can stop this thing. But it is going to require a real strong and persistent presence.

We did it this last year on the money. We got historic funding for lesbian and gay health and human services. The Governor vetoed the damn thing twice, and we beat him back until he gave us $1 million — $1 million for gay and lesbian youth out of a Republican Governor running for President. That is change, but we did it because we hammered the hell out of the guy. So that is the message.

MR. WOLFSON: Okay, so there are at least two assignments, ways the Pride Agenda can put you to work in your copious free time.

But what Tim has mostly talked about is holding the line, holding against, playing defense and blocking the bad bill in the Legislature.

Tim also mentioned, however, the importance of education, outreach and firestorm. And, frankly, even if every gay person gets on the phone, we still need some non-gay people helping us there. How do we do that? How do we enlarge? How do we bring in more non-gay people?

Patty?

MS. PENELOSA: Well, at Marriage Equality, that is exactly our job. He talked about getting the wind to change, and I like to think of our organization as the wind machine. How we do this is step-by-step, person-by-person, organization-by-organization. We start

very small. I started with a couple of doctors of mine. I hounded them. I left the press kit on their desk when I left the examination room. I just got a letter in the mail where they signed the Marriage Resolution, with a little note that said "good luck."

So the way we are going to build this is by starting with you — you going to your friend and telling them about this movement, telling them a story, a personal story of how you have been discriminated against, because you have. You do not know it, but if you are in a partnership, you have been discriminated against when you go into the hospital, when you go to do your taxes. My partner and I live together, of course, and we each pay two separate sets of taxes. We are getting double taxed to get half the service. So we are being discriminated against.

What we do is we started with our mothers, our fathers. I told my father, "Do you want me to be treated like this?" My father fought in Vietnam, so I used that on him. I said, "Why did you fight in Vietnam if I am just going to be a second-class citizen, or people like me?"

The first thing is to start at home — and when I say "home," I mean home: your brothers, your sisters, your friends, your family, next-door neighbor, et cetera. This is a very deep personal commitment that you have to have to take to do this, but people respond. I have received no negative responses thus far. That is the first place.

The second place is organizations. Start with Fordham. I do not know if they have signed the Marriage Resolution or they are in support, but that is another place. Look to the professors here, the professional organizations that surround the university and Lincoln Center. If everyone in here would think of one organization and bring the name up to me, I will make sure that they get a press kit from Marriage Equality. That is how we are doing our outreach. It is very simple; it is very basic. But you have to do it. You have to start at home and then build.

The third thing is once you start building with the organizations, you move next to bigger state organizations, and that is where we are working with ESPA and legislators. At Marriage Equality, we have a legislative branch of the organization that sends out letters, where we also do the phone banking. We did work hand-in-hand with ESPA and Lambda and other organizations to make sure that we are all kind of following each other. So this shadowing has been really effective for us, because people are starting to perk up.

Mark Green keeps saying "Yes, yes," like Tim said, but I finally want him to just sign it, say it, do it.

You can get people to do this on every level, but if you start small, those are the biggest victories, in my mind, because this is a mind-changing movement.

Now you are not going to go out and change the mind of some clergy, but you can get others, and those are just as valuable. Look at what is happening in California where the Episcopalians married a lesbian couple, and now they are going to go — and that sends a message to the rest of the people. So it started with one. It ended up with thirty, now there are sixty, now there are ninety — we are going to keep doubling.

Panels like these are also part of our outreach. We also want to work with schools, elementary schools, perhaps making sure they have textbooks available, and have sensitivity training. We want to cover all of New York the best that we can, step by step, individual by individual. It is very easy, but the work is grunt work. So if you have a grunt persona, we invite you to join Marriage Equality. If you do not want to be discriminated against, if you do not want to be a second-class citizen, and if you are just plain sick and tired, join us. This fight is for you.

Now I have a personal story to tell you. I had a miscarriage in October, and my partner and I went into NYU Hospital. When we walked into the emergency room, the intake nurse tells Linda, my partner, that she cannot come in with me because she is not my immediate family. Now, I am sitting there completely stressed out. It was one of the saddest days of my life, and to have Linda not be able to come there with me or just stand there by my side — I could not believe it was happening. But you know what? I had no fight in me that day; I had nothing. So I went into the emergency room, and I heard some screeching down the hall. I peeked over and then I see Linda arguing with the nurse, walking down. She is coming in, she is going to stand there; it is just too damn bad.

By the time we left there, she had made nice with the nurse in such a way that the nurse said, "You know, I just did not know; I am really sorry." Something really terribly bad turned okay in the end, because one person, one nurse, understood. If I had had the presence of mind, I would have handed her a Marriage Resolution and said, "Please sign and thank you for your support."

That is what is needed here. That is the type of grassroots we do at Marriage Equality. You tell your personal story and you win the hearts and the minds one by one.

MR. WOLFSON: Okay, briefly and specifically, Monday morning people in this room call up and say, "I have a little free time. I can think of my mother, who belongs to such and such a group, and maybe I can have her contact so-and-so." They call you and tell you that. What do you do? How do people get involved?

MS. PENELOSA: Okay, first of all, I want to challenge everyone in this room before you leave to leave me a name of an organization or somebody who you think will endorse the Marriage Resolution or support Marriage Equality. That is number one.

The second thing is that if you call me, there are ways that you can come in — literally, this is run out of my apartment and other people's apartments — to stuff envelopes, to get marriage resolutions. I will hand you ten and you can approach people and say, "Oh, by the way, would you sign this Marriage Resolution? Yeah, it is this organization I belong to, and we are trying to get the freedom to marry." People will sign. How can they not? You look so good.

Finally, the little things really matter. Even if you just had an hour, a half-hour, to put a label on a packet or collate the media kit, all those things, you do not have to be the brainchild. Really, if you can just come in and dedicate or volunteer a half-an-hour to your personal freedom in the United States, it would really help this organization, the state and yourself.

MR. WOLFSON: Okay, Peter, one example from you. You wrote the Bar Association Report two years ago;[39] the City Bar took a position in our support. What are you doing now?

MR. SHERWIN: What are we doing now? We are not just sitting on the Report. The Report is nice, but it is really an educational tool. It is something to hand out. It is something to say, "Look, you know, the fight is worth fighting because the law is not that bad, and in fact, it is pretty good."

What are we doing now? We are talking to other bar associations. We are in that process right now. We are writing letters to the Queens Bar Association and to the Asian-American Law Coalition. We are writing letters to the Philadelphia Bar and to the San Francisco Bar. We are writing letters to the ABA. We are writing letters to the New York State Bar Association.

We are following up with calls. We are saying, "Look, do you have a lesbian and gay aspect to your organization? Do you have a committee? Do you have a task force? What are they doing?" We

39. *See* Bar Ass'n Report, *supra* note 21 and accompanying text.

already got calls back when the report first came out from places such as Utah and Arizona, saying "We want to do a report like this; send us your materials." That is what we want to hear. That is what we are encouraging people to do.

The most important thing that lights a fire is the beginning of that letter to the other bar associations, which tells them that we are on the cusp, just as Evan and everybody was talking about earlier this morning. Vermont can come down in March. Hawaii could come down any day. As soon as that happens, we are going to have — again to steal from this morning — a tidal wave engulfing us, and we need to be prepared. You guys are already in the process of being prepared, because you are educating yourselves. You are here today.

So what I am doing through the City Bar Association? My committee is trying to go out to other similar organizations and educate them and get them to agree on that level that this is something, as a matter of law, as a matter of what is just plain morally right, that they should sign on to. But you can do that as well. I do not know if you are all law students, but you are going to look for jobs, if you have not already found them. You can go to your employers and find out what they are up to.

I am sitting here listening, and I just realized that Proskauer has not signed that resolution. I am going to go on Monday, and we are going to get that resolution signed.

MR. WOLFSON: And then once Proskauer signs it, Proskauer is going to do what?

MR. SHERWIN: Proskauer is going to go to Paul Weiss and say, "Hey, guys, you are behind us on this one," which is exactly what I like to say to Paul Weiss, and many other firms. And Cravath — has Cravath signed on?

MS. PENELOSA: I am working on it. I had them update their forms, because I had to sign — you know, with the domestic partnership, and sign all of that. I wrote to the head of the firm and I said, "You know, domestic partnership is recognized in New York City, and you are not in compliance, and toward fairness and inclusivity, can you please add domestic partners? On there next to single, married, divorced, widowed, you know, I want domestic partner."

So they wrote back within two or three hours. They e-mailed me and said, "Thank you for bringing that to our attention," and about three weeks later, the head of benefits stopped me in the elevator and said, "Thanks a lot, you just increased my work."

So that is a step in the right direction. And I know that there are a few lesbian partners and a few gay partners in that law firm. So, hopefully, I will start working them over and start winning everybody else over.

MR. WOLFSON: The dirty little secret of this form of activism is that asking people to sign the Marriage Resolution, beginning to engage them in that discussion, may result in them signing, and then they become part of the list and we snowball that list. We have a select illustrated example over there of the kinds of people and groups that have signed, and that is great. That is the growing coalition of fair-minded Americans that are increasingly supporting our freedom to marry.

But the secret is that whether they say "yes" or not, the fact of asking them is what we need to be doing. Even if they say, "Well, you know, Proskauer does not sign resolutions; thank you, Peter, but we really appreciate the opportunity to have discussed it," that is an important gain. We have moved people to start thinking.

When Vermont happens, when Hawaii happens, when the breakthrough happens, when the Legislature starts to move, when we need people to start acting on our behalf, that is not the time to begin talking with them. In advance is the time to begin talking with them, and even if they do not say "yes" the first time, your asking them again and again, patiently and persistently, is what is moving this in our favor. That is the secret of the Marriage Resolution. It is the process, not just the results, that matters.

IS SEXUAL ORIENTATION IMMUTABLE?: PRESENTING SCIENTIFIC EVIDENCE IN LITIGATION TO GAIN STRICT SCRUTINY

DR. BROOK: The idea of having a session about this topic of immutability came to me because I am a physician, and I have been in practice for fifteen years, and one of the reasons I am in law school is I think there is a great need for communication between doctors, lawyers and scientists, and this seemed to be a perfect topic for such a collaboration.

Our first panelist is Suzanne Goldberg, who is a senior staff attorney for Lambda Legal Defense, and, as an expert on anti-gay initiative issues throughout the country, she is part of the legal team that successfully challenged the Colorado Anti-Gay Amendment 2[40] and served as counsel for numerous other anti-gay measures, including the Cincinnati Anti-Gay Initiative 3.[41] Suzanne leads Lambda's challenge to criminal laws in Arkansas and Texas banning same-sex sexual contact and also has been involved with challenges to sodomy laws in Tennessee and Montana. She also litigates and advises on issues involving lesbian and gay families, including domestic partnerships and equal employment benefits. She has just recently published a book, *Strangers to the Law: Gay People on Trial*,[42] about the Colorado Amendment 2 trial. I am also pleased to say that she is adjunct professor here at Fordham and teaches a seminar of law on sexuality and the law.

Please welcome Suzanne Goldberg.

MS. GOLDBERG: To me, this is a fascinating topic. I will be talking this afternoon about the law and setting up the legal framework to identify where immutability issues even fit in litigation. Dan is going to discuss the science. Kate will present a social political critique of some of these issues, which you will also get a bit through my presentation. We are planning to leave a lot of time for questions and discussion, and we look forward to that.

What I want to do here are three things: first, lay out the legal landscape; second, talk about the use of scientific evidence related

40. COLO. CONST. art. II, § 30b (1993) (permanently enjoined by *Evans v. Romer*, 882 P.2d 1335 (D. Colo. 1993), *aff'd*, 517 U.S. 620 (1996)).

41. CINCINNATI CITY CHARTER art. XII (1993) (constitutionally upheld by *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997), *cert. denied*, 119 S. Ct. 365 (1998)).

42. LISA KEEN & SUZANNE B. GOLDBERG, STRANGERS TO THE LAW: GAY PEOPLE ON TRIAL (1998).

to immutability at trial, in particular the *Romer v. Evans* case;[43] and, third, offer a critique of the use of science-based immutability evidence in litigation in light of my experience as co-counsel in *Romer*.

For those of you who do not exactly remember everything you learned in Constitutional Law in the most clear fashion, let me just remind you that, the Supreme Court and lower courts occasionally employ closer scrutiny of governmental classifications. Where a law classifies or distinguishes between groups based upon a particular characteristic that has been deemed suspect or quasi-suspect, the courts will employ closer review, known as strict or intermediate scrutiny.

Through various cases, the Supreme Court has announced that there are a couple of factors that are taken into consideration in making a determination about whether a classification is suspect or quasi-suspect: whether the classification has been the basis for a history of discrimination; whether the burdened group is relatively politically powerless vis-à-vis the majoritarian political process; and, whether a characteristic is obvious, immutable or distinguishing. That last inquiry is obviously the one we are going to focus on here.

Courts sometimes also ask the question — which I think is actually the most appropriate and important question — of whether the characteristic bears any relationship to an individual's ability to perform in or contribute to society. However, there is nothing in any of the Supreme Court's decisions that says that these three or four prongs, however you want to lay them out, are supposed to be applied mechanically.

Instead, these prongs are supposed to be used as guideposts. And so, if they are supposed to be used as guideposts and not absolute requirements, why are we even talking about engaging in litigation specifically to satisfy the immutability prong? What has the court said about immutability? What is the significance of whether a characteristic is immutable?

The Supreme Court has characterized in various ways its concern with the nature of a characteristic that serves as the basis for government line-drawing. For example, in *Frontiero v. Richardson*[44] sex discrimination case, the Court was centrally concerned with whether the characteristic was an "accident of birth." In *Plyler v.*

43. 517 U.S. 620 (1996).
44. 411 U.S. 677 (1973).

Doe,[45] a case about whether the children of undocumented immigrants could attend public schools, the Court talked about whether the characteristic was outside of an individual's control. So clearly, there is some concern with whether a characteristic is entirely volitional or not, but there is nothing in these cases that talks about whether the characteristic has to be genetically immutable. Obviously, being the child of an undocumented immigrant is not a genetically immutable characteristic. There are some questions, as well, about whether sex is biologically immutable or not.

So why would we even be talking about introducing scientific evidence in litigation when the legal test does not seem to require this sort of showing? Unfortunately, a number of lower courts have taken these Supreme Court guideposts as mechanical rules. In particular, several courts that have addressed the question of whether sexual orientation-based classifications should be suspect have said, "Well, homosexuality is behavioral; therefore, it is not immutable, and the classification based on sexual orientation cannot be suspect."

So the instinct on the part of some lawyers is to try to prove scientifically that homosexuality is not behavioral, that it is in fact a physically immutable characteristic. In light of the lower court cases reinforcing this point, it is an understandable instinct. But, again, I do not think it is the correct instinct for reasons I will describe as we are talking here.

This clash between the Supreme Court's test and lower courts' application of the test brings me to our next question, which is what does the trial look like if litigators decide to use scientific evidence to try to satisfy the "immutability" test.

This fact was pursued in *Romer*, the case challenging a Colorado amendment that banned state and local government entities from ever prohibiting discrimination against lesbians, gays and bisexuals. The Supreme Court ultimately struck down the amendment in 1996 as lacking a rational basis and therefore violating the U.S. Constitution's equal protection guarantee.

In its earlier phases, the plaintiffs also urged that the court should apply a heightened scrutiny to the classification on another basis on the theory that sexual orientation classifications, like the one embodied in Amendment 2, were suspect or quasi-suspect.[46]

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45. 458 U.S. 1131 (1982).

46. *See* Evans v. Romer, No. CIV.A. 92-CV-7223, 1993 WL 518586, at *5 (Colo. Ct. App. 1993).

There were very different views on the plaintiffs' legal team about how we should go about proving this point— whether we needed to prove facts related to our argument that heightened scrutiny should be applied; and, if we did need to provide factual evidence, how we should do so. Some of the lawyers on the team wanted to make sure that the record was as complete as possible to support any of our arguments on appeal — and, to be fair, that was a reasonable and, I think, a conservative approach in some respects.

Others of us, myself included, believed that it would be a big, expensive and confusing mistake to try to scientifically prove the immutability of sexual orientation to satisfy that obvious, immutable or distinguishing prong. Here are the reasons why:

(1) Expense. Whenever you try to prove this sort of scientific theory in court, you have to have expert witnesses, and we did. We had several. We had Richard Green, a psychiatrist who has been studying these issues for a number of years; Judd Marmor, former President of the American Psychiatric Association, who had completed extensive research, studies and writings on these issues; and Dean Hamer, who at the time was a molecular biologist, and the Chief of the Gene Structure and Regulation Section of the Laboratory of Biochemistry at the National Cancer Institute and has done tremendous research in DNA and other things that Dan will explain.

(2) Confusion. Why? How many people in the room have at least a college-level background in any sort of science?

A fifth maybe. For most lawyers, the science is pretty confusing. Consequently, both the direct and the cross examinations of the scientists are being done by lawyers who do not really understand the depths of the scientific issues, so the presentation of testimony is not always the clearest, to say the least.

More significantly, introducing scientific evidence was also theoretically confusing. At the same time as we were telling the court that the law did not require physical immutability and instead required only a showing that the characteristic at issue was obvious, immutable or distinguishing, we were still offering a full-scale scientific study of sexual orientation. We were, in a sense, undercutting our argument that we did not have to prove physical immutability by putting in a large body of testimony and scores of exhibits, suggesting that we thought we did have to prove immutability as a matter of fact.

(3) Setting Priorities. The third problem in introducing all of the scientific evidence regarding immutability is that it took a huge amount of trial time – more than twenty percent of the trial was spent with experts on these issues. The heavy level of attention suggests that immutability and, more generally, suspect classification was a very, very important issue to our winning the case, and it was not. As at any trial, you have to weigh the question of "How important is what you are trying to prove?" versus "How does the presentation of information reflect the priorities of your overall trial strategy?"

That having been said, what did this all look like at trial? Richard Green reported on a number of studies that Dan is going to discuss, including his own work showing that a biological marker exists for sexual orientation, including Simon Levay's brain studies showing that the hypothalamus of gay men was a different size from the hypothalamus of straight men and women (who were not identified by sexual orientation). Very interesting material.

Judd Marmor, the former President of the American Psychiatric Association, talked less about the science and more about the American Psychiatric Association's decision in 1973 to declassify homosexuality as a psychiatric disorder, which caused a major shift in our ability to pursue equality in legal forums for lesbians and gay men.

Dean Hamer, a molecular biologist, really gave us the most extensive discussion about science. He talked about the DNA studies that he had done, and attempted to explain to a room full of lawyers his finding of a genetic marker for sexual orientation on the Xq28 region of the X chromosome in men. He managed to do a terrific job of explaining this clearly, analogizing DNA to a long sausage with the Xq28 as a little band on the sausage.

One of the difficulties with all of these studies — which the cross-examiner failed to bring out — is that none of them prove conclusively that sexual orientation is genetically immutable. Moreover, the studies at the time of trial were limited in the population they addressed, with virtually no research having been done on women.

Despite these weaknesses, the scientific experts managed, overall, to convey their points strongly. The following excerpt from the state's cross examination of Dean Hamer captures the challenges faced by the cross-examination as well as the humor, perhaps unintentional, that these examinations brought to the courtroom.

In this excerpt, the cross-examining lawyer appeared to be attempting to show that the scientific DNA research was not meaningful and did not prove that being gay was an immutable characteristic:

The cross examiner opened this line of questioning: "The percent of DNA shared by human beings, in other words, the DNA similarities between human beings, is how much?"

Dean Hamer's answer: "On average, each person shares about 99.9 percent of their DNA with other human beings, with each other human being."

The cross-examiner: "So my DNA is almost exactly like your DNA?"

Hamer responds: "Your DNA is on average about 0.1 percent different from my DNA, and it is about 1 percent different from a chimpanzee's DNA."

So the questioner asks: "All the difference between the two of us is accounted for by 0.1 percent?"

Hamer: "All the inherited differences of DNA are accounted for by that 0.1 percent, and all the inherited differences between you and a chimpanzee are accounted for by 1 percent. The rest is identical."

The questioner: "Knowing you and me, because I do not know any chimpanzees —"

"— I am short, a short balding guy, and you are taller. That is accounted for by 0.1 percent of the DNA?"

Hamer: "It would actually require much less than 0.1 percent of the DNA. It is within 0.1 percent, that is right."

"You have hair, as you notice; I do not. That is accounted for by that same 0.1 percent?"

Hamer: "Predominantly, and possibly some differences in our age and other factors."

The questioner, a heavyset man, then asked "My bone structure appears to be a little bigger in places than your bone structure; that is accounted for by that difference?"

Hamer: "It is probably accounted for somewhere in the three million differences that you and I have."

And it went on from there. Although entertaining, it was hard to imagine how this discussion, even with Hamer's skillful responses, would assist the court in resolving the question of whether sexual orientation was a suspect classification and it did not. After many hours of testimony accompanied by a plethora of exhibits, the trial court simply concluded that "the preponderance of credi-

ble evidence suggests that there is a biologic or genetic 'component' of sexual orientation, but even Dr. Hamer, the witness who testified that he is 99.5% sure that there is some genetic influence in forming sexual orientation admits that sexual orientation is not completely genetic. The ultimate decision on 'nature' versus 'nurture' is a decision for another court, not this court, and the court makes no determination on this issue."[47]

Not all that surprising, but that is in hindsight. On appeal, neither the Colorado Supreme Court nor the U.S. Supreme Court ever mentioned any of this testimony.

I am going to turn this over to Dan now to talk about all the science that I have just glossed over. I wanted to leave you with one last quote that I think offers another important perspective on these issues — both as they arise in litigation and more broadly in the social debate.

In 1984, Ginny Apuzzo, who at the time, headed up what was then the National Gay Task Force, was asked to comment on the significance of a finding that a biological marker for homosexuality had been reported in gay men. Addressing the broader discussion about the roots of sexual orientation, she said: "I do not think it is an argument worthy of our energy. The problem is not what we are; it is what they are. If people stopped asking why we are homosexual and would ask why they are homophobic, that would be a step forward."

With that, I will turn it over to Dan.

DR. BROOK: Thanks, Suzanne. It is interesting that I was planning to get into less scientific detail than Suzanne, because from my perception, as a physician and scientist, much of the stuff that was discussed in this trial does not sound like it had very much relevance to the question of immutability, and there are other things that may actually be more relevant.

As Suzanne said, the debate between nature and nurture in the etiology of homosexuality is unresolved. Most scientists and clinicians agree that sexual orientation is fixed at an early age, certainly before age five or six, and that probably combinations of biological (or genetic) and environmental factors are at work.

One type of study has been designed to attempt to separate genetic factors from environmental factors and involves comparing pairs of identical twins and comparing them with pairs of fraternal twins. Identical twins have identical genetics. Fraternal twins are

47. *Id.* at *11.

genetically no more similar than any two siblings in a family, similar but not the same, but do share very similar environments in their upbringing. Therefore, when identical twins share a trait to a greater degree than fraternal twins, it is assumed that that trait is more likely to have been influences on a genetic basis.

In men, if one twin in a set of twins is homosexual, between fifty percent and one hundred percent of the other in the pair of identical twins (depending on the study) will also be homosexual. By comparison, only fifteen to twenty percent of male (or female) fraternal twins will be concordant for homosexuality. In female identical twins, studies show about a fifty percent concordance rate for homosexuality. The greater concordance rate in identical twins compared to fraternal twins is thought to be attributable to a genetic influence on the trait of homosexuality.

Suzanne mentioned the Levay study. In his neuroanatomical study, Dr. Levay examined anatomical structure in the hypothalamus, a very important structure in the brain that is known to be involved with functions such as hunger and thirst, and, at least as demonstrated in animals, with sexual arousal and sexual behavior. When he looked at the structure in women, versus heterosexual men, the hypothalamic structure in heterosexual men was consistently larger, whereas the same hypothalamic nodule in homosexual men was about the same size as that found in the women. However, even though this finding sounds very provocative and suggestive that sexuality may be determined by this hypothalamic structure, in fact, the correlation does not prove a cause and effect relationship between the size of the hypothalamic structure and the sexuality of the individual. For all we know, it could be that the correlation demonstrates a "use it or lose it" effect.

Another type of study in the etiology of homosexuality has been gene studies, exemplified by Dean Hamer's work. Hamer selected families in which there were at least two brothers who were both gay. By doing that, he was looking for an unusual phenomenon, that is, a grouping of homosexuals within a family, suggesting that there might be some kind of genetic relationship. When he compared the DNA from the two gay brothers and the DNA in another brother in that family who was not gay, he found that in ninety-nine percent of these cases, the gay brothers shared the same gene or specific gene region, a very, very tiny part of the DNA, whereas the gay brothers and non-gay brother did not share that gene. If one is able to repeat that finding in enough people and find that it is consistent, realizing that ordinarily there is a fifty-fifty chance

that any sibling is going to share the particular gene, that is statistically good evidence that the gene correlated with the trait. In fact, there is only one out of 100,000 chances that these kinds of results would be attained by chance alone. Thus, this is relatively convincing evidence of correlation between sexuality and the gene. However, it is important to note that this finding does not suggest that all homosexuality is related to that or any other single gene. Nor does it explain how the gene might actually be involved in the etiology of homosexuality.

Having said all that, while the evidence of biological etiologies as the cause of homosexuality may be important, and inborn or genetic characteristics probably tend to be less easy to change, in fact, inborn behavior may still be changeable. For example, consider left-handedness. If one takes a person born genetically left-handed, one can train her to write with her right hand. Furthermore, learned behavior is not *necessarily* changeable. So even if it turned out that homosexuality is caused by an early environmental influence rather than an inborn genetic influence, it would not necessarily mean that it was mutable.

So how does one determine immutability scientifically? If ethically feasible, the best approach scientifically may actually be studies that seek to determine if, and how easily, sexuality can be changed. One of the stumbling blocks and sources of confusion has been the concept of the definition of "homosexuality," and what it is that one is trying to change if one is to try to change sexuality.

One way to define homosexuality is purely on behavioral terms. A person is homosexual if he is a male who has sex with other males, or she is a female who has sex with other females. Any time one can demonstrate in a study that one can prevent or alter that activity, if you define homosexuality by that activity, theoretically you would be demonstrating that that activity may be chosen or avoided, and in that sense it could be argued that it is mutable.

There are quite a number of techniques intending as a goal to change homosexuals to heterosexuals. Some of the more famous ones are those used by psychoanalysts and psychotherapists, particularly those — some of whom still are very active — who believe that homosexuality is a disease, in spite of the removal of homosexuality from the list of psychiatric disorders by the American Psychiatric Association over twenty-five years ago.

One large study, performed by Bieber et al. in 1962, examined 100 homosexually-behaving patients. All of the homosexually-be-

having subjects in the study were voluntarily participating in psychoanalysis with the purpose of having their homosexuality altered. All of the participating psychiatrists were attempting to do the same. Twenty-seven percent of these people were "successfully changed" from engaging in homosexual behavior to not participating in homosexual behavior and, in many cases, engaging in heterosexual behavior. Notably, many of these men had in the past had some heterosexual experience.

This conversion was only measured at the end of the study, and in many cases there was no follow-up at all. No effort was made to determine whether these individuals were having any homosexual fantasies or had any feelings of unexpressed homosexual attraction, but they were considered "cured." Seventy-three percent of these highly motivated individuals undergoing 150–350 hours of intense therapy had not been changed. Do these findings prove mutability or immutability?

Similar sorts of outcomes have been seen with a type of behavioral therapy, aversion therapy. This is therapy where the experimenter will show the subject a picture of a nude male or female and determine physiological response by measuring either a penile or a vaginal wall. When the subject has the "wrong" response (i.e. a physiological response to someone of the same gender), the experimenter gives the subject an electric shock, or gives the subject an injection of a drug that makes him severely nauseated. The goal of this therapy was to change homosexual behavior, and sometimes replace it with heterosexual behavior, and in some studies the therapy was reported to be effective.

Using this physiological arousal as a definition, another psychotherapist, Dr. Freunds, after "curing" (changing the sexual behavior from homosexual to heterosexual) a number of his patients, decided that he wanted to see if he had really converted these homosexual patients to heterosexuality. He tested them using penile and vaginal physiological measuring devices and found that just about all of his supposedly heterosexual male patients were still responding to male photographs, and not to the female photographs. Some of these patients remained convinced that they had been converted to heterosexuality, and continued to behave heterosexually, even though they continued to have this homosexual physiological response. Mutable of immutable?

Another way of defining homosexuality takes into account fantasy and attraction as well as behavior. Kinsey took fantasy and attraction, and not just overt behavior, into account when he per-

formed his famous studies in which he developed his sexuality scale, the Kinsey scale, which defines individuals as being anywhere from one end of the scale (zero), in which the individual has no homosexual fantasy, behavior, or attraction, to the other end (six), where the individual is homosexual in his/her attractions, behaviors and fantasies.

In some studies, experimenters using Kinsey's definition were able to interview some of the subjects who had been studied and "cured" of their homosexuality in some of the psychotherapeutic and behavioral studies. Consistently, they found that these people had fantasies and attractions for people of the same sex and in many cases were actually having some behavior with the same sex, as well, having followed them out over time. Thus, if one defines homosexuality to include fantasy and attraction as well as behavior, even if there is no overt homosexual behavior, the bulk of the evidence suggests that homosexuality is immutable.

Which of, and how, these different definitions are used and how homosexuality is understood will have a crucial effect on how one frames the question of immutability. Ultimately, it is how the question is framed that may be determinative as to the adjudication of immutability.

It is now my pleasure to introduce Kate Diaz. Kate is a gay rights activist for over twelve years. She was a national organizer of the 1997 civil disobedience action on the steps of the U.S. Supreme Court. She was previously on the Board of Directors for the Gay Community News in Boston, and she is currently on the Board of Directors of the Center for Lesbian and Gay Studies in New York. She has been an attorney in practice both in the public and the private sectors and is currently associated with Walker, Morgan & Finnegan. She is a freelance writer who has done a great deal of thinking and writing on the issue of immutability and sexual orientation for gay and progressive publications.

Let's welcome Kate Diaz.

MS. DIAZ: I am missing part of Suzanne's comments. I think that my sense, Suzanne, is that to some extent the issue was left unresolved — and I think this is what Dan spoke to — but I believe the issue has been resolved in the sense of the dominant ideology.

Justice is supposedly derived from rationality, and rational justice depends primarily on the properties and types of liberty. But "liberty for having," the pie being only so big, which invokes dis-

tributive justice, and "liberty for being," or dignity, are not necessarily the same thing.

As Professor Klome has noted, protection against core existential "unfreedoms" is necessary for the very existence of persons as social agents, and thus a condition for justice rather than one of its solutions. It, therefore, has to have priority. In classical liberal theory, there should be no rivalry in basic needs. The basic existential liberties are conditions of dignity, not just the means of achieving dignity.

Still, economic justice is critical to a larger justice in society. When we fight for the right not to be discriminated against in housing, not to be fired for being gay, to have access to services, to have access to the political process, to have political asylum, to have privacy, we are fighting for our wants, the allocation of which is a topic of economics converging with politics and ideology, ethics, philosophy, psychology and, I suppose, science, too. What better example than the right wing's twisting of equal rights into special rights and feeding on the economic insecurities of straight voters?

But the subtopic I want to discuss today for this panel is the political economy of theories of homosexuality. Whose wants and needs are met? Well, this is the political currency of the meaning of homosexuality. To address these issues I want to describe and use three examples: the political economy and ideology of science, of the media and of gay activism in defining what it means to be gay and what it does not mean.

These three areas converge in the law. As lawyers — and I know some of you are lawyers in training — our only tools are words, and in litigating every case there is one essential strategy: tell a story. Developing the story is a key bonding experience between the lawyer and the client. The lawyer is giving words, a voice to the client who has been silenced, wronged or shut out. The story empowers the client. The story develops as you compare the case, but you better have the story together when you go to trial and present your court papers. You better have the issues framed in such a way that the story makes the answers to the issues self-evident so that the judge or jury murmurs, "Of course, justice requires X."

But what do you do when your story lacks a unified theme in one area? What would you do if you were trying a class action with the most unruly of classes, like trying to herd kittens scurrying every which way and their theories, wants and desires? What do you do when you as a lawyer are to some extent dis-empowered by legal

precedents, the prejudices of the day, the exigencies of trying to win, while crafting the story? What if you must present a story you are not so sure of yourself? Are you compromising the ideal of the very justice you seek? What if the story was already written for you before you have a chance to use those words as weapons? How have scientists, the media and activists written the story with their own agendas in mind?

Science. Science has written a story that heterosexuality is the norm and homosexuality the problem, the puzzling deviation, the defect in the genes and/or the hormonal makeup that it is located in the body. This is not new. The innocent quest of a Simon Levay and his hypothalamus studies or a Dean Hamer and his gene studies, really self-quests of why they turned out gay and hence lost some of the privileges attendant to white men in society that they expected to enjoy, have their roots in the late nineteenth century.

The great German sex researcher, Magnus Hirshfeld, set out to show scientifically that homosexuals were essentially different, with the hope that social and legal benevolence would follow. In 1908, Hirshfeld and the Scientific Humanitarian Committee developed a questionnaire to investigate homosexuality to determine how, not if, homosexuals were different in their minds or bodies. Thousands of people answered, because they wanted to decriminalize homosexuality. They thought that if homosexuality was biological they would not be morally culpable for their desires. When the Nazis came to power, they burned Hirshfeld's institute, but they picked up on his theories of biological difference, how the Jewish body, in addition to the homosexual body, was different and degenerate.

So the latest studies provide a back-to-the-future glimpse of the culture and politics that make theorizing homosexuality based on biological causation attractive at particular moments in history. In pre-war Germany, homosexuals were becoming more visible. So too now we are becoming more visible. While homosexuality has repulsed or revoked curiosity in many straight people, scientists enchant and allure.

Science has become our secular religion. Scientist gods unlock the mysteries of our very being, but despite over one hundred years of trying to unlock the biological basis of homosexuality, the results are inconclusive. Turning to science for an unassailable answer to social questions, questions about homosexuality, what social rights, what freedoms we are entitled to.

Moreover, a key to understanding in the scientific study of human sexuality is elided, that human sexual behaviors are com-

plex expressions of the interactions of genes, environment, opportunity and culture, factors that cannot be isolated. The desire for definitive answers about the cause of homosexuality will persist, but the impossibility of achieving certainty means that the subject will remain a marker of our cultural anxieties about sexuality in general, the most meaning attempts of human activities, as Professor Sedgwick has noted.

Science gets bracketed with a status of purity and detachment that advocacy never does, although judging does. Richard Piller, author of many twin studies, is preoccupied with the fact that his daughter is a lesbian, his sister is a lesbian, he and his brother are gay, and he has reason to think that his father was gay. Could it be something about his family other than genetics?

Nor is there purity or detachment in the money associated with scientific research. Scientists need to promote their own work. They need research money. They need to make a name for themselves to enhance the control of their own work and research interests. The Human Genome Project is a multibillion-dollar endeavor to map and sequence all the DNA of the human prototype. The mapping and sequencing are valuable intellectual property. The sequence will define what it is to be human. In the 1990s, homosexual and heterosexual alike turned to science as the final arbiter of the most natural sexuality of all human beings.

Let's look at the media. In the media, homosexuality sells. You remember the headlines from 1991 when Simon Levay's study of a region in the hypothalamus of allegedly homosexual men was released. *New York Times*: "Zone of Brain Linked to Men's Sexual Orientation";[48] *Washington Times*: "Scientist Link Brain Anomaly Homosexuality."[49] *The New York Times*, in particular, has had a steady drumbeat on this issue, the biology of what it means to be gay. In an interesting confusion of gender roles with sexual preference, *The Times* did a tie-in article to the Levay study entitled, "In Fish, Social Status Goes Right to the Brain."[50]

Lesbians have generally been absent from these studies and media coverage, although last year we were treated to headlines, including this one from the *Washington Post*: "Lesbians' Hearing

48. Natalie Angier, *Zone of Brain Linked to Men's Sexual Orientation*, N.Y. TIMES, Aug. 30, 1991, at A2.

49. Joyce Price, *Scientist Link Brain Anomaly, Homosexuality*, WASH. TIMES, Aug. 30, 1991, at A3.

50. Natalie Angier, *In Fish, Social Status Goes Right to the Brain*, N.Y. TIMES, Nov. 12, 1991, at C5.

Resembles Males, A New Study Suggests."[51] You know that was straight males, as opposed to female. Lesbians are somehow not "real" women.

So the political economy at play here is whose voices crowd out others in the media. Science journalism is very much boosterism. Science journals often have a "you scratch my back I will scratch your back" relationship with their subjects. Of course, this exists with political journalism and punditry, but I suggest that journalists tend to be less skeptical of the scientists they cover than other public figures. They often take studies at face value and credit them without even presenting critiques of such studies; or, worse, deriding those who do critique such studies as people who want to rain on the parade or have an ax to grind.

I do think that scientists and the media aid and abet each other to sensationalize and trivialize the complexities of human sexuality. Journalists are on deadlines and can be lazy, so they do not do the legwork of historical analysis of past studies, contextualizing the studies, or noting their inconsistencies. Sometimes they seem just like scribes rewriting press releases.

But ideology is also at play, as I alluded to before, on the anxieties of the people who control media outlets, outlets that are becoming increasingly integrated — "synergy" in the marketers' words. So despite an increase in channels, as it were, there appears to be a decrease in viewpoints, which brings me to my final example: gay activists.

As our movement grows, our voices have become somewhat unified over the ragtag group of gay liberationists of the late 1960s and 1970s. Interestingly, it was these early liberationists, many of whom, I am sure, always felt this way, who argued for choice, that challenged heterosexuals to examine their own bisexual or homosexual potentials that might be realized in a more liberated world.

Today, discussions of whether homosexuality is biologically determined are chockfull of emotion and tension. It is the subject of fractious debate. If nothing else, the controversy proves that disparate experiences, whether conscious or unconscious, cannot be conflated into scattered cells in one region of the hypothalamus or a genetic sequence.

I do not think you build a movement on "I cannot help myself; I was born this way." It is not particularly empowering. While many gay people who feel they had no choice in their sexuality are

51. *Lesbians' Hearing Resembles Males, New Study Suggests*, ARIZ. REP., Mar. 3, 1998, at A4 (taken from the *Washington Post News Service*).

threatened by those who are bisexual or believe they have some choice in the matter, even suggesting that the latter group is more privileged and accepted by straights, I do not think one can deny which side has had greater exposure and social currency as of late. Whose story is winning out? I say this despite the right wing's emphasis on choice as a moral failing, but this is where we come back to protection against core existential unfreedoms, what I began my talk with.

It is an irony, is not it, that the story of those who feel that their empowerment as social agents is to act on their wants, desires and needs as a matter of dignity and agency, our supposed liberal foundation in the United States, like freedom of religion, are elided to a degree. As Nan Hunter has noted, expressing that you are gay is what makes you gay. Is the status conduct distinction a compromise to one's duty of candor to the court, to one's duty to all gays? You never really had a choice in your religion of birth, did you?

On that note, I will close with a topic you might think I should have started with, but it goes to the power of language and whose voice is heard, the currency of speech by activists. Recently, I attended a media training workshop led by the Gay and Lesbian Alliance Against Defamation, and in their kit they instruct you that you are to use the phrase "sexual orientation"; you are not to use the phrase "sexual preference." So I thought I would close with reading definitions from the *Webster's Third Edition*, just some of them.

"Orientation: the act of determining one's bearings or setting one's sense of direction."[52] An allusion to the birds and the bees: witness the bee's momentary pause for orientation before it headed back to the hive.

"The settling of a sense of direction or relationship in moral or social concerns or in thought or art; choice or adjustment of associations, connections, or dispositions."[53] One that I think is particularly apropos is definition five: "the change of position exhibited by some protoplasmic bodies within the cell in relation to external influences and the relative positions of atoms or groups in a chemical compound."[54]

Now, "Preference": "The act of preferring or the state of being preferred, choice or estimation about another, a high evaluation or

52. WEBSTER'S DICTIONARY 1591 (3d ed. 1986).
53. *Id.*
54. *Id.*

desirability; the power or opportunity of choosing"[55] — and this is what I think we are talking about, to have the opportunity to act on your different desires, whatever origin you think they may have — "someone or something that is preferred, an object of choice, a favorite"[56] — which is your favorite ice-cream.

In the precise language that is necessitated by the law, "preference" seems more accurate, but the prevailing gay ideology has expunged it.

Thank you.

55. *Id.* at 1787.
56. *Id.*

GENDER THEORY AND LESBIAN, GAY, BISEXUAL AND TRANSGENDERED EMPOWERMENT

MS. KERN: I am Cynthia R. Kern, not to be confused with the eminent Cynthia S. Kern, who is also here. I am a third-year student at CUNY Law School, and I am going to be moderating the panel today, which has the very short title of "How Does the Struggle for Transgender Liberation Inform the Legal Strategy of the Lesbian and Gay Civil Rights Movement?"

To my immediate left is Paisley Currah, Professor at Brooklyn College, teaching political science, and Dana Turner is right beside her; Dana is a Director on the Board of the International Conference on Transgender Law and Employment Policy (ICTLEP). Then we have Professor Katherine Franke, who teaches here at Fordham. Everyone is going to give their own personal spin on this very important issue.

MS. TURNER: Let me introduce myself. I am a 1991 graduate of Georgetown University Law Center, and, after 39 years of life as David Turner, I re-constructed myself as only a critical legal theorist could do, and, since 1993, I have changed my gender and have been living as a person of the transsexual persuasion. Now, for the first time in my life I feel "normal." Well, as normal as a Jesuit-educated, self avowed socialist/feminist/anarchist, African American transsexual could ever hope to feel. Therefore, that makes me what the literature describes as a "normative transsexual." Since 1997, I have served on the International Conference on Transgender Law and Employment Policy, and I have been a civil rights activist for more than thirty years. I feel honored to have been selected for this panel today and to be here representing the viewpoint of a practicing transsexual.

So with that introduction, I would point out that, here, on the eve of the twenty-first century, people of a transgender experience — like lesbians, gay males, bisexuals, people living with AIDS and HIV disease, bisexuals, individuals who identify as queer, and all sexual minorities generally, have become an integral part of our society at every imaginable level of human activity and interaction. Whereas a half-century ago, or even a couple of decades ago, transsexuals were not a commonly recognized entity. Now, more and more, we see them everywhere, and our growth in numbers gives no indication of subsiding.

I have a few news items, and I will read them as quickly as I can. I think it will give you an overview of the landscape of the law and societal conditions faced by transgender people.

January 26, 1999; Louisville, Kentucky: By a vote of seven-to-five, the Louisville Board of Aldermen passed the first city ordinance in Kentucky protecting citizens against employment or workplace discrimination on the basis of their sexual orientation or gender identity. Several amendments ultimately affecting transgenders had been made to the original bill. The passed bill narrowed the definition of gender identity to include only those who have completed a sex-change operation. Cross-dressers and pre-operative transsexuals undergoing hormonal sexual reassignment therapy are not protected by this bill.

Employers, gender-specific dress codes, public restrooms, changing facilities and religious institutions are also exempted from the bill.

February 23; Annapolis, Maryland: A state transgender rights group, called "It's Time, Maryland," announced its opposition to the Maryland Antidiscrimination Act of 1998,[57] prohibiting discrimination based on sexual orientation. Even though the Maryland gay rights bill came within one vote of being passed the year before, the "It's Time, America" transgender group refused to endorse this year's bill.

The Maryland General Assembly members sponsoring the bill refused to amend it with language expanding the definition of sexual orientation to encompass those having or being perceived as having an identity expression or physical characteristics not traditionally associated with one's physical sex or one's biological sex at birth. Due to this political slight, the chairperson of "It's Time, Maryland" abruptly resigned from the board of directors of the Free State Justice Campaign, a statewide coalition of gay groups that drafted the original bill.

Similarly, a group called the Gulf Gender Alliance in New Orleans picketed the premiere fund-raising event of the Human Rights Commission ("HRC") in 1994. They picketed HRC tables and Gay Pride booths across the country during the summer of 1995 because HRC refused to endorse an employment nondiscrimination act that would include transgendered people. HRC had expressed, as has the major sponsor of the group, Representative

57. H.R. 315, Reg. Sess. (Md. 1999).

Barney Frank, the idea that any amendment that included transgendered people was doomed to failure.

These examples really illustrate part of the debate that goes on in the transgender community today. Many people, as I said, feel that a bill or law that protect people on the basis of sexual orientation, meaning lesbians and gays, but do not protect transgendered people should be struck down completely. Other organizations, like the International Foundation for Gender Identity, say that any bill is better than no bill.

November 26; Bronx, NY: The mother, brothers, cousin and neighbor of a twenty-seven-year-old transgendered Puerto Rican woman named Jalea Lamont were assaulted by New York City police officers, verbally abused, maced, arrested and charged with sundry misdemeanors and felony offenses after Nancy Lamont, Jalea's mother, called 911 when she could not awaken her child from a cold-and-flu-medicine-induced sleep. Paramedics that responded to the call found that Jalea was not in need of medical assistance, but when police officers unknowingly passed Jalea Lamont in the hallway, they held the door for her and referred to her as "ma'am." When they discovered that Jalea Lamont was transgender, one police officer followed her into the bathroom of her family's apartment where she was attempting to hide after he began verbally abusing her. He beat her with his fists and a nightstick, even as she begged him to stop because she had recently undergone silicon implant surgery.

He called her a "he/she," an "it," and a "fucking trans-testicle." When relatives and neighbors tried to intervene, the officers allegedly beat and maced them, too, including two young children, and claimed that the family had attacked them. Jalea was treated at Bronx Lebanon Hospital, and the officers also reported injuries.

December 31, 1993; Falls City, Nebraska: A lesbian, a gay man and a female-to-male non-operative transsexual were murdered execution-style with gunshots to the head on New Year's Eve. Brandon Tina, the female-to-male transsexual, was twenty-one years old and had lived as a man for three years before being beaten and raped at a Christmas party the week before by the same two men who killed him. Lisa Lambert was twenty-four and Philip Devy was twenty-two.

Police in Falls City, Nebraska, did not charge the pair when the original crime was reported, and, in fact, publicly identified the trans-man as a female-male impersonator. The harassment continued, culminating in the triple slaying, while an eight-year-old child

cried in a nearby crib. The shooter in the case was sentenced to death for the three murders.

August 25; Greenwich Village, New York City: Police reported a dispute between two groups of men believed to include transsexuals and transvestites all involved in prostitution in the Lower West Side meat packing district, led to the fatal shooting of an eighteen-year-old Patterson, New Jersey man on the corner of Sixth Avenue and 14th Street in Manhattan. Four men, two of whom wore women's attire, attacked Rivera with a baseball bat, knives and a 45-caliber handgun, shooting him once through the chest. They fled in a dark Lincoln Town Car and were arrested later in the day in Jersey City. Rivera was pronounced dead at St. Vincent's Hospital.

Exactly one week before, thirty-six-year-old Fitzroy Green, a well-known transvestite prostitute, hustler, S&M dungeon master and freelance process server, was murdered in his apartment near Greenwich and Charles Streets in the West Village, allegedly by a twenty-one-year-old Bronx man who told the police that he killed Green, known affectionately as Jamaica, because after accompanying him to his apartment for a sexual encounter, he discovered the victim to be a male instead of female. He stabbed Jamaica eighteen times, once in the chest and seventeen in the back. The suspect met the victim in front of a popular bar on Christopher Street, called Two Potato, which features performances by female impersonators. He is using the famous homosexual panic defense.

January 8; Austin, TX: In a case eerily reminiscent of Matthew Shepard's murder,[58] the body of a gay gender-questioning eighteen-year-old teen-ager was found. His name was Donald Scott Fuller . He was also known as Lauren Page . He was found in a wooded area along South Congress Avenue of Houston with a nine-inch gash across the throat and several stab wounds to the head and torso.

Five days later, a twenty-eight-year-old, Gamalio Korea, was arrested for the murder. He and his brother-in-law both admitted to having met Lauren and another transgendered kid on the notorious "Austin whore stroll" and paid to have sex with them. Although Austin City Police said they were leaning toward not classifying the murder as a bias crime, Travis County, Texas district attorneys have announced their intention to process the case as a hate crime. The suspect faces a very real possibility of execution by lethal injection, considering the liberal voting record of Travis

58. *See supra* note 4.

County, Texas residents, who elected an openly lesbian county sheriff last November.

November 29; Quedlindorf, Germany: Residents of that tiny East German village of 1048 persons voted to dismiss their mayor, Norbert Lindner, age forty, after he began wearing women's clothing and calling himself Michaela. The divorced father of two children and member of the former East German Reformed Communist Party said that if she lost the vote of confidence from the villagers she would leave Germany for her sex reassignment surgery. Although Michaela's mayoral term was not to end until 2003, she herself called for the referendum while appealing for tolerance and understanding from the townspeople of Quedlindorf, who were shocked when hundreds of transsexuals from across Germany, France and Western Europe converged on the hamlet to demonstrate their support for Mayor Lindner.

In Trinidad, Colorado, a small town twenty miles over the New Mexico border, in a clinic that was once originally operated by the United Mine Workers of America union, a seventy-five-year-old general practitioner, Dr. Stanley Biber, has performed 3800 sex reassignment surgeries there in his seventy-bed hospital since his first penectomy (penis removal) in 1969. Where once, as one of only a few American doctors willing to perform this surgery, he performed three sex change operations a week, now he does only one, while other doctors have developed specialty practices in the field. Dr. Biber also reports that he now does — where at the beginning he did almost entirely sex reassignment surgeries for males to females, he says about half of his clients are female to male. That is from the *New York Times* of Sunday, November 8.[59]

These vignettes represent the legal situation that transgenders, transsexuals, transvestites, cross-dressers and gender-benders of every persuasion find themselves in, and to varying degrees they find that they are compelled to express themselves and manifest their personhood in the clothing, attire or visage of the gender opposite their biological sex.

People who transcend the established norms and boundaries of sexual identity are born both male and female, as well as inter-sex and as hermaphrodites. Although most of my examples given here involve male-to-female transgender pioneers, as I stated, the percentage tends to be about equal between male-to-female and female-to-male sex reassignment surgeries.

59. *See* James Brooke, *Sex-Change Industry a Boon to Small City*, N.Y. TIMES, Nov. 8, 1998, at A1.

A cursory examination of a simple area of personal identification documentation illustrates the obstacles that transgender and gender-variant individuals must navigate. Whereas medical technology has made surgery possible for more and more persons than ever before in history, the legal predicament that transgender people find themselves in is very precarious and unsettled.

Under the present legal system, even postoperative transsexuals are enjoined from any number of official societal institutions and social activities, such as marriage, just as lesbians and gays are, although interestingly, with transsexuals — and there are many postoperative transsexuals in the country today who, having been in legal heterosexual marriages before their sex reassignment surgery, are now in legal same-sex marriages. So some same-sex marriages do indeed exist in this country.

Whereas common law name change is widely recognized as something that anyone could do, through usage and by order of a court, having one's birth registration materials changed is something entirely different. New York will change the sex designation on one's driver's license, although most window counter clerks in the DMV offices know nothing of the policy. It is called Procedure 435, and it was just a letter ruling by the Commissioner of the Department of Motor Vehicles.[60]

The Social Security Administration readily reissues Social Security cards with a new name, although not a new Social Security number, to facilitate the full employment of people who use professional pseudonyms, like actors and authors. Therefore, transsexual people, preoperative or postoperative, are able to take advantage of the name being able to change there.

Some states do allow a court order to change the actual birth certificate, while other states do not. Roberta Achtenberg's *Sexual Orientation in the Law*[61] gives a list of those states. The State Department will also issue a passport with a sex designation change upon presentation of a letter from a medical professional.

For transsexuals the prospects are not entirely bleak, although they find themselves in about the same position that lesbians and gays find themselves in.

Last, I would say that I like the title. I think that it should probably be the other way around. I think that it is probably the lesbian and gay civil rights movement, that informs the struggle for trans-

60. Commissioner of Dep't of Motor Vehicles, Ltr. Rul. Proc. 435.

61. LESBIAN, GAY, BISEXUAL RIGHTS COMM., NAT'L LAWYERS GUILD, SEXUAL ORIENTATION AND THE LAW (Roberta Achtenberg & Karen B. Moulding eds., 1998).

gender liberation, as the transgender movement has in a lot of ways — the organized political transgender movement has modeled itself after the lesbian and gay civil rights movement. Although we recognize that transsexuals have been leaders in the gay civil rights movement since before Stonewall, and particularly at the 1969 Stonewall rebellion, their role in leading the movement toward expanded sexual liberty is changing and growing every day.

MS. KERN: Thank you, Dana.

MS. TURNER: I will end with one saying of Confucius: "One of the great pleasures in life is in doing the things that people say cannot be done."

MS. KERN: Thank you. I think it is very important to realize what is going on out there in the world right now and that much of the violence that we hear about and much of the problems that transgender people deal with every day are problems we are dealing with, too, but they are problems that transgender people have always been dealing with, and in a very, very violent and very immediate way.

Would you like to go next, Paisley?

PROFESSOR CURRAH: Before I get started, I also want to get a plug in for my other affiliation, and Dana Turner's too. There is a new group in New York State called the New York Association for Gender Rights Advocacy ("NYAGRA"), and Dana and I are members. NYAGRA is a membership organization that advocates at the state and local level for self-determination in gender expression and identity, which means that it is a transgender political rights group. I also have to handout a publication that I co-authored with Shannon Minter, an activist handbook on how to get a transsexual/transgender civil rights bill passed based on what has happened in other places.[62]

My talk today is actually going to be a series of stories, four stories with a few larger points, "grandiloquent points" that I will intersperse between the stories.

The first story — and this will hopefully speak to the larger goals of the Lesbian, Gay, Bisexual and Transgendered ("L/G/B/T") movements — is about Katherine McIntyre's name change and the Catch-22 situation that this transsexual woman found herself in when she tried to negotiate her life as a woman.[63] Katherine McIn-

62. PAISLEY CURRAH & SHANNON MINTER, SECURING CIVIL RIGHTS PROTECTIONS FOR TRANSGENDERED AND TRANSSEXUAL PEOPLE: AN OVERVIEW OF EXISTING STATUTES AND LEGISLATIVE STRATEGIES (1998).

63. *See In re* McIntyre, 715 A.2d 400 (Pa. Sup. Ct. 1998).

tyre works for the city of Harrisburg, Pennsylvania. She represents herself as a woman in every area of her life — her bank information, credit cards, voluntary participation in organizations — but she has to go to work as a man, as Henry McIntyre. The reason she has to go to work as a man is because she has not had a legal name change, and her employer says if you do not change your name, you cannot go to work as a woman.

When she went to the court to ask for a legal name change, the court said, "No, you have not passed the real-life test, which means living for at least a year in all aspects of your new gender." The catch, of course, is that her employer will not recognize "him" as a female and allow her to come to work as a woman until she has her name legally changed, but she cannot get her name legally changed until she passes the real-life test. It took three years of litigation for her to be able to go to work as a woman, as Katherine Marie McIntyre. This story demonstrates how different authorities rely on different proofs of gender: For the psychiatric establishment, one's gender identity is proved by passing the real-life test, for the male-to-female transsexual, is really a "high fem" test. Can you be Betty Davis for a year? For her employer, it is the legal name change that is necessary to change her gender identity at work. Finally, the state-sanctioned legal name change relies on the real-life test. This Catch-22 situation reveals the arbitrariness of gender definition but the state's authority to police these definitions remains in place.

The first grandiloquent idea I want to put out here today is this: In the United States, we do not have an established church, so the state obviously does not support — wink wink — any one particular religion or denomination, but we still have a country which is one of the most religious in the world. There are hundreds of thousands of religious communities who think everybody else is completely wacko and they are the true believers. What we have, though, in this country officially is religious pluralism, and it is the separation of church and state that guarantees this pluralism. My point today is that the most fundamental goal of the transgender and of L/G/B/T politics needs to be the dis-establishment of the current gender regime. If sexual minorities, including transsexuals, transpeoples, queers, gays, lesbians and bisexuals, can agree on nothing else, we should agree on that. So regardless of our own personal views about the truth of gender, we need to work to disestablish the state's ability to define and regulate the relations between biological birth sex, which if you investigate you realize is a

completely messy concept; gender identity, one's sense of being male or female; gender expression; and sexual orientation. So far, a lot of the L/G/B/T movement is working only on sexual orientation — for example, preventing openly gay men and lesbians from being fired. But the movement thus far has not really focused on what goes into the construction of sexual orientation: sexual orientation, defined in terms of same or opposite sex or gender object choice, is coherent as a concept only if sex and gender remain uncontested categories.[64]

Once we take away the state's authority to define sex and gender, we can spend all our time working on building our own disparate gender communities, getting into shouting matches with people whose views we do not like, working on them to convince them how wrong they are, converting them to our view. You know how that is, right? For example, I am exaggerating here a little, the butch/fem lesbians think the androgynous lesbians are weirdoes, and the androgynous lesbians think the butch/fem people are patriarchal throwbacks, and the butches think that FTMs are completely out of line in changing their bodies. Everybody just thinks the other person is wrong. That is what gender pluralism within the longer L/G/B/T movement is.

So in a gender pluralistic society, one that respects the official doctrine of separation of gender and state, the stakes in terms of the distribution of resources would not be so high. No one would lose custody of a child, be denied medical treatment, be denied access to education, public accommodations, et cetera, be left especially vulnerable to hate crimes, because something about their gender was a little or a lot nonconforming to an official gender regime.

Obviously, I am preaching to the converted here, and obviously this thought experiment is not exactly right around the corner. No one is going to just discover a lost amendment — you know, part of the Bill of Rights — "Oh, we just found it in a trunk." I wanted to lay out this vision of the separation of state and gender in order to emphasize one fundamental principle, and that is that we, as members of diverse and endlessly proliferating communities of L/G/B/T people, do not have to agree on any one truth or any one narrative about gender before we start working together to dismantle the state's gender regime. We do not have to come to any agreement on which gender theorist will be our standard bearer, whether it be

64. *See* Paisley Currah, *Queer Theory, Lesbian and Gay Rights, and Transsexual Marriages*, *in* IDENTITY/SPACE/POWER (forthcoming) (discussing the point further).

Judith Butler or Harry Benjamin, or even, God forbid, Janice Raymond. So that is my whole take on gender theory.

Story two is about a bathroom. Utah officials chose to designate the women's room of the county courthouse of Tooele County as a unisex/single sex toilet.[65] That is breaking news obviously. But what was going on here was that there was a transsexual woman who was working in the courthouse, and the county officials were trying to accommodate this woman because her co-workers objected to using the same restroom as someone they perceived as male. They had a woman and a men's room. So officials then decided to designate the restroom as a "unisex" restroom. It was the kind of bathroom where you go in, lock the door, and no one else can come in. But the result of this whole situation was that the genetic women in the workplace claimed that this restroom arrangement created a hostile work environment and decided to sue. I like this particular story because it is a very American story. If you have any doubts about gender, just sue.

Now, for time reasons, I will spare you the next grandiloquent point I was going to make, except to point out that the bathroom issue actually stands in for transsexual and transgender employment issues more generally. When it is the case of a current employee who decides to transition, most of the anxieties about gender boundaries get articulated as bathroom issues. There is a lot more going on there but all these anxieties are condensed into the bathroom question – issues of privacy, and labor issues more generally.

The third story is about a transsexual marriage. There are lots of stories these days about transsexual marriages, but what I really like about this particular one is the right-wing response to it. I will just read you a little bit of the news story. This is Utah again.

"A transsexual midway through operations to become female was granted a marriage license in Salt Lake County last month and married fiancée Marlene Smith." Nicole Cline, formerly Neal Cline, married Smith on January 17 at the — which church? — the Metropolitan Community Church, of course. Now a spokesman for Focus on the Family in Colorado Springs — remember, that city was ground zero of Colorado's anti-gay Amendment 2 — said he was skeptical about this marriage. Quote: "I do not know that I would even think of it as a marriage. The design of marriage is the coming together of differences, not sameness. It escapes me what

65. *See* Michael Vigh, *Women Ban Transsexual From Restroom*, SALT LAKE TRIB., Aug. 22, 1998, at B1.

makes this arrangement so great." Here we see a problem in the homophobic and transphobic logic of the right wing. They do not like transsexuality; they do not like same-sex marriage. This spokesman could just see it as an opposite-sex marriage, the way the state does, but he decided to come down against same-sex marriage instead. The consequence of seeing this marriage as a same-sex marriage is that he is forced to recognize the phenomenon of transsexuality.

Cline was listed as a male on the application form. According to the clerk, "We had him sign an affidavit that he swore under oath that he was the person he represented himself to be. There were no court papers that said he changed his sex, only that he changed his name." Cline was named the groom on the marriage license. after being told that "somebody needed to be."[66]

The funny thing about this story is that Nicole Cline is the same woman who had the bathroom problem in the Tooele County courthouse. So she has had quite a legal year. She is just trying to live her life, but she had quite a year, coming up against legal gender barriers more than once.

The ontological chaos hiding just underneath the surface of the state's laws on marriage, sex and gender identity, is revealed by the Christian Right's response to these kinds of marriages. Here is another similar marriage, exact same situation. Someone had not transitioned, so was recognized by the state (Oregon) as a male, and was marrying someone the state recognized as female. So the leader of the Oregon Citizens Alliance, Lon Mabon, when he heard about this transsexual marriage, announced he would immediately begin organizing a voter referendum that would define marriage as a strictly heterosexual institution and gender as something determined at conception — "It stops this playing around with Mother Nature," according to Mabon.[67]

The Christian Right's attempt to defend traditional notions about the relation between chromosomes — because it has to be at conception that would be the only way to find out — and gender identity by possibly resorting to a statewide referendum exposes the futility of such a senseless gesture. I mean, when you have to

66. Michael Vigh, *Transsexual Woman Weds Woman in Legally Recognized Union*, SALT LAKE TRIB., Feb. 5, 1999, at C1.

67. *See* Paissly Currah, *Defending Genders: Sex and Gender Non-conformity in the Civil Rights Strategies of Sexual Minorities*, 48 HASTINGS L.J. 1363 (1997) (discussing these cases in detail).

put this supposedly natural thing up to a vote, there is a problem going on here.

Finally, this last story gets us more directly back to the idea of disestablishing gender. On March 19, 1998, Bill Maher, the host of "Politically Incorrect," delivered an extended riff on a transgender man, and here is some of what he said throughout the show.

There is a person I am going to say "person," because I am not so sure what this person is. It is a woman, a person with female genitalia born Alice Myers. She is at Harvard, declared herself a man. Now, she has not gone through any operation, any hormone, anything when people — you know, there are such things as transsexuals, transvestites. She looks like Yentl. She just has a short haircut and wears men's clothing and glasses, and you know, in a crowd you might not say, "Oh, that is a woman," but this is a woman dressed — but she says "I am a man," because she just wants to be a man. The question is, can you just declare yourself to be something that nature did not make you?

It says, he says, "I am a man. Everything I do in life I do as a man." Say this person is on the Titanic, hits an iceberg, women and children first; do not you think they would be the first one to get into an evening dress, pumps, and a matching handbag?"[68] So that is the punch line to the joke.

Now, at this point in the show, Sally Jesse Raphael, one of the guests, jumps in and says — and you know it is not good when Sally Jesse is your champion — "You are unfair to these transgendered." Bill Maher interrupts, saying, "What do you mean 'these?' There is one. This is it."[69]

Obviously this is an example of rabid nasty transphobia, but let's try to be a little more specific about what is going on here. Does it represent some kind of fear on Bill Maher's part about gender fluidity where the relation between sex and gender is very much unmoored, that one can simply change their gender by starting to look like Yentl? Well, yes, obviously it is about this fear. Is it about the fear that non-genetic men will usurp genetic male privilege? (I have a friend who calls genetic men "accidental men," but I will use the politically correct though still not completely scientifically sound term "genetic men.")

According to Maher, Alex has a girlfriend and Maher seems both concerned and jealous about this whole girlfriend idea. So it

68. *Politically Incorrect with Bill Maher* (ABC television broadcast, Mar. 19, 1998).

69. *Id.*

is clearly a little bit about that. But the kicker to his extended riff on Alex Myers, one that he saves until the end of the segment, is that this guy would change back to being a woman, a high-fem woman no less, in a second, to get a space on a lifeboat on the Titanic.

This brings me to my last "grandiloquent point." This transphobic story transitions into a slightly different kind of story. It is questioning the permeability of the boundaries of the sex/gender classification system. And those boundaries are so contested because this gender system that we have now is one of the key mechanisms through which scarce resources — boats, in the case of the Titanic, Social Security and other state benefits in the case of legal marriage — are distributed or not distributed. A regime that does not adhere to the doctrine of the separation of gender and state is going to produce a lot of anxieties and clashes about its rules of gender classification. Conversely, if one's beliefs and practices about gender played as little a role in determining one's position vis-à-vis the legal opportunity structures as the way one's religious beliefs and practices now do, the myriad of conflicts about gender – from gays in the military to transsexuality – would continue no doubt, but would be emptied of the considerable force of state sanction.

Thank you.

MS. KERN: Thank you very much.

Professor Franke?

PROFESSOR FRANKE: I hope you do not mind if I come over here. I teach torts in this room. So on behalf of both my torts class and Fordham Law School, I want to welcome you all here.

It is exciting to me to have so many lesbian and gay people and friends here at Fordham, which is not to say that we do not have friends here the rest of the week.

There has been sort of a nice thread where we have each picked up where the other one left off. I want to try to do that, as well, and ask a question that I think is lurking where Paisley ended, which is: What is transgender-based discrimination a question of? Why should we, as lesbian and gay, bisexual or heterosexual people, care about transgender-based discrimination? We tend to bundle groups of identity-based concepts into civil rights categories. Why do we add transgendered people and issues affecting transgendered into the lesbian, gay and bisexual movement as opposed to say, the women's movement? I do not profess to have a complete answer to this question, but I am going to begin by making the question more complex and then suggest some answers.

Just as any adequate account of the nature of discrimination against black people, for instance, must go beyond the mere status of a person's race to questions of white supremacy in order to provide an adequate account of race discrimination, or any adequate account of discrimination against women must go beyond biological facts of people to an adequate account of patriarchy, I think that in order to provide an adequate description of discrimination against transgendered people, we have to include the cultural norms that compel in subtle and, as we have heard from these stories, not so subtle ways a set of compulsory gender identities and norms.

In the short time that I have today, I am going to cut through the niceties and suggest what I think are two fundamental strategic errors that have been made — not by everyone but by some — in advocating on behalf of the rights of transgendered people, and then elaborate a little bit on why I think those are mistakes. Then if you are interested, we can talk about them a little more during the questions.

First, is that I think it is a significant mistake for us to advocate to add transgendered people to the laundry list of protected statuses that appear in most antidiscrimination laws: sex; race; national origin; religion; and, if you are lucky, sexual orientation. I do not think we should add another semicolon and add transgendered people.

Second, explaining in part, why I hold the just expressed view, I think it is an even graver mistake to see the discrimination faced by transgendered people as to be problems in which only transgendered people have a stake. All of us have a stake, whether we are transgendered or not, in the kinds of discrimination that people who are believed to be transgendered experience.

Now let me, as my two prior panelists have done, begin by giving you some examples, and I think there is a particular importance to our telling stories and giving examples in this area, because these are parts of life that so often are ignored and silenced. It is extremely important for us to work from real-life experiences and the types of problems and violence that people experience day-to-day who are transgendered.

First, Big Boy restaurant refused to hire a preoperative transgendered woman as a hostess because she was transgender. When she brought an action for sex discrimination, the court dismissed the complaint and held that the law does not protect males dressed or acting as females, or vice versa. According to the court, that is

not what sex discrimination laws were intended to or should be interpreted to apply to — not surprising, for any of you who have looked at this area at all.

Secondly, a preoperative transgendered woman who worked at Boeing, the big airplane manufacturer out in Washington, was told by her employer that they had a policy regarding the employment of transgendered persons; apparently, in Washington there are a number of transgendered employees that had worked there — and that as long as she was pre-op, she could not use the women's bathroom and could only wear either male or unisex clothing. Curiously, though, unisex clothing was defined by Boeing to include blouses, sweaters, slacks, flat shoes, and — then this is the great part — nylon stockings, earrings, lipstick, foundation, and clear nail polish, no colors.

She was, however, instructed in addition not to wear clothing that was excessively feminine, such as dresses, skirts and frilly blouses. Blouses are okay; frilly blouses are not.

Now, remember, as a preoperative transsexual she has to live in the gender role that she is choosing to officially occupy. So she has to thread a needle between unisex on the one hand and overly feminine on the other, and in order to do so, this poor woman's supervisor was instructed to tell her each day whether or not her attire was acceptable. The test that the supervisor was instructed to apply was whether her dress would be likely to cause a complaint were she to use a men's room at the Boeing facility. This is the "transgendered woman in the men's room at Boeing" test.

One day she comes to work wearing an outfit that had been previously approved by her supervisor but decided that day to accessorize it with pink pearls and was fired immediately for wearing clothing that was excessively feminine. She brings an action in state court in Washington and ultimately loses in the Washington Supreme Court.[70]

Finally, a masculine woman worked as a teacher in a juvenile detention center where her supervisor, a female judge, described the unwritten dress code as that which was "appropriately feminine" — because, after all, they were role models for the young girls in their charge — and this woman was ultimately fired for wearing the "Brooks Brothers look," the look that all of you who are either lawyers working in firms or will be some day know well.

70. Doe v. Boeing Co., 846 P.2d 531 (Wash. 1993).

She would not wear skirts; she wore pants and was fired for that reason, that she was a bad female role model.

Now only the first two examples here involve transgendered people, but the principle at stake in all three, I believe, is the same. This is about coerced enforcement of gender orthodoxies through workplace rules, and we could come up with other examples in other parts of life. This orthodoxy reflects a collapsing of gender, which is a set of cultural norms and biological sex in such a way that femininity is understood as the natural and authentic expression of female agency, and masculinity is understood as the natural and authentic expression of male agency. So just as you cannot mix and match sex and gender, masculinity and maleness, femininity and femaleness, so too you cannot switch sides. Men do not become women. Males do not become females.

These qualities, sex and gender, are regarded as being normatively immutable. In that sense, it is naturally impossible to change, and we should not want to in the first place. So it is wrong of us to want to pull something off that is not possible to do anyway.

There is a Supreme Court case from 1989 which I am sure many of you are familiar with *Price Waterhouse v. Hopkins*,[71] that should have resolved all of these cases. There, Ann Hopkins, who had been a very well-performing woman at one of the top accounting firms, applied for partnership. She was denied partnership because — and if you are a litigator, this is just the greatest thing that they actually put this in writing — she was "too macho." She should enroll in a course at charm school to learn how to walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled, wear jewelry and learn how to accessorize like the poor woman at Boeing did.

So Ann Hopkins did not wear the pearls and lost the job. Now she won her sex discrimination suit in the U.S. Supreme Court, because the Court interpreted the sex discrimination provisions in Title VII to include the imposition of gender-based norms on men and women.[72] To punish a woman because she acts aggressively or to hold a view that women should not act aggressively or cannot is gender-based discrimination, according to the Supreme Court in 1989.[73] An incredibly important decision, an incredibly important victory. We were all excited. I was very excited when this case was

71. 490 U.S. 228 (1989).
72. *See id.* at 229.
73. *See id.*

decided, and we thought, "Well, this is really going to change the landscape of Title VII sex-based discrimination to include gender norms."

Well, sad to say, it has not. You would have thought that this ruling would have invalidated the three examples of the types of workplace rules that I gave you before, but it just has not been the case. You continue to see courts uphold the idea of clothing rules that enforce the idea that certain clothes belong to men and other clothes belong to women and that you cannot switch sides. So people who are born male wear women's clothes as part of a transsexual process continue to be discriminated against in the workplace, on the theory that Title VII or workplace antidiscrimination laws do not reach transgendered people, without understanding that this is not about some hybrid special situation; this is about gender norms.

To my mind, both our legislative and litigation strategies on behalf of transgendered people should not be to add transgendered people or transgenderism — or whatever the word is in your jurisdiction — into the laundry list of identity groups or statuses that are protected by human rights laws, but instead to robustly interpret what our sex- and gender-based discrimination laws prohibit, which includes the idea that real men do not sleep with men, real women are not masculine, real men do not want to be women. They all stem from a central similar notion about who men and women are and how we should behave in the world to perform our gender identities.

MS. KERN: Thank you, Katherine.

STICKS AND STONES: THE NEXUS BETWEEN HATE SPEECH AND VIOLENCE

MR. CHEN: Welcome. My name is Jack Chen. I am a member of Fordham Law School's class of 1996. I first approached James about organizing this panel, partially because of the media's response to the Matthew Shepard incident,[74] and also because of Reverend Phelps's "www.godhatesfags.com" Web site that serves as a very clear example of hate speech.

What I was hoping to do today was try to put our arms around the bigger issues, some of the grayer aspects of what really constitutes hate speech and how it may be related to bias crimes and what we can do to begin thinking about trying to address this in society.

To my immediate left is Laura Edidin, managing attorney of the New York City Gay and Lesbian Antiviolence Project; then we have Professor Brian Levin, director of the Center on Hate and Extremism and a Criminal Justice Professor at California State University, San Bernardino; and lastly, Professor Jack Battaglia from Touro Law School.

First, we will start with Laura, who will give us some examples of hate speech that are experienced by people of lesbian, gay, bisexual, transgendered and HIV status ("L/G/B/T/H").

MS. EDIDIN: The Anti-Violence Project serves L/G/B/T/H crime victims. The areas of crime in which we do counseling, advocacy and legal services include domestic violence, bias crime, rape and sexual assault, pickup crimes and police misconduct, and I will also add HIV-related violence, because that is also a program that I coordinate. We define HIV-related violence as anytime someone is victimized because of their actual or perceived HIV status.

Part of the work that we do is bearing witness to the pain and trauma that are suffered by L/G/B/T/H crime victims, and it is in that role that I am here today. I want to talk about violence in the nexus with hate speech. I am studiously avoiding defining hate speech at this point because I want to just have all of us hear what it sounds like, give you a sense of what it feels like, and what it looks like. When I initially sat down to think about it, my first instinct was to intellectualize what hate speech is. I wanted to back off a step and talk about what we probably all agree is hate speech just by listening to it, and then draw some examples in the end of

74. *See supra* note 4 (describing the Shepard hate crime).

speech that I would like to see what people's opinion is on whether it is what your visceral reaction would categorize as hate speech.

I am just going to start by giving some examples of narratives about victims of crime, and then wrap up with some thoughts and some ideas.

I am going to start in the area of domestic violence and tell you some stories. The first one is about a woman. She and her partner lived together with their two children, and this woman's mother had mental illness and substance abuse issues. She wanted to come live with this couple, and they said, "We do not really think this is a good idea for our kids to have you in the home."

She was not happy with that, so one of the ways in which she dealt with that was by standing on the corner near their apartment, yelling all day long, "See that woman over there? She is a pussy-eating dyke. She is a fucking lesbian."

It escalated from there to her moving across the street to the stoop and telling the kids, "You want to know what your mom is doing? I will tell you what she is doing. She is eating that woman's pussy."

Then it escalated from there into her approaching their front door and pounding on it until she broke in, insisting on sleeping there for the night.

Another example is of a woman who resides in this country illegally. She was dating a man for a long time, and he said, "Why don't we just get married? It would make things easier with immigration, and we have been together a long time and have generally been thinking about it." She says, "Okay, let's do it."

About a month after they were married, she tested positive for HIV, and when she sat down to tell her husband, he was initially very supportive and said, "Well, let's go get another test and double-check, and I will get one, too." When the test confirmed that she was positive and that he was negative, he turned very abusive, told her that she was dirty, that she was a carrier, that no one else would have her now that she was soiled by having HIV, threatened to reveal her HIV status in order to jeopardize her immigration proceedings and used it as an excuse to have sex outside their marriage.

The impact of this kind of language is really complicated, but what these examples bring out is the shame that is involved on the part of the victim when they are on the receiving end of abuse like that. For example, in the instance of the woman whose mother was harassing her, she started to pull away from her partner. There

started to be tension in their relationship. A lot of it came out of internalized homophobia and the shame around the fact that she was in love with a woman.

As for the woman who has HIV, she started to see an effect in her health. I think that is true generally of people who are victims of crime, but when someone already has a compromised immune system, they feel that physical impact of the abuse even stronger.

To give you another example of domestic violence, a transgender woman entered into a traditional marriage. At the time, he lived his life as a man and his wife knew that his gender identity was as a woman, but at the time he did not present as a woman to the world. They married, had two children, and at a certain point he decided that he wanted to live his life as a woman and started dressing as a woman.

His wife became very abusive. She would sit at the breakfast table and tell this transgender woman that she was ugly, that she was disgusting, that she repulsed her, and it escalated to the point where she threw a skillet full of eggs in the woman's face.

Moving into the area of bias crime, a very recent example that we encountered was a case where two African American women were driving a car in Manhattan and the light turned yellow, and they decided to stop for the light. The taxicab driver who was behind them was not happy about that and started honking his horn, stuck his head out the window to see what they looked like, and noticed a rainbow bumper sticker on their car. He started calling them "black bitches," "nigger dikes" and other sundry names. When that did not get the response he was looking for or did not satisfy him, he started ramming his taxi into their car in the hopes of pushing it into the oncoming traffic in the intersection. I will tell you that, thanks to the work of one of our victim advocates, Momie Moran, the taxi driver's license was revoked and there was a fine.

Another example of HIV-related bias crime is a composite of a couple of different stories that we have heard — there was a gay man who lived with his adopted son in an apartment building where one of the neighbors started to harass him on the basis of his sexual orientation and HIV status, and that ranged everything from yelling "Die, AIDS faggot," to putting burning garbage on his doorstep, to scrawling on food delivery menus that were stuck on the door, "these men are gay, they are spreading AIDS, they are child molesters." It escalated to the point where an order of protection was issued on behalf of the father and his adopted son, thanks to the good work of another legal intern.

I want to talk about the impact of those crimes. Victims of crimes where hate language is used, where it is motivated by bias, may try to change their behavior as a way of avoiding being victims of another crime. For example, the women may have wanted to take the rainbow sticker off their car. Victims may avoid gay-identified establishments; for example, victims of crimes outside of a gay bar or a gay bookstore or an AIDS service organization may avoid those places.

There was an instance in Brooklyn recently where a woman with short hair was walking down the street and a man approached her and said, "You want to know what it is like to be a man? I will show you what it is like to be a man." He took her, pulled her by the hair and pulled her head down and beat her head until she was incapacitated. The impulse may be for her to grow her hair out, since that is what seemed to be what made her a target.

Another impact on victims of crime, particularly crime where hate speech is used, is the tendency to blame themselves for what happened — "I should not have been out so late; I should not have gone home with someone I did not know." That has a lot of consequences, not the least of which is failure to seek medical attention, for example.

I spoke with one man who was the victim of a bias attack, and I said, "Are you injured?" He said, "No, no, just a couple of little things." I said, "Okay, well, what is bothering you?" He said, "Well, you know, my ear." I said, "Why don't you tell me more about that?" He said, "I don't have any hearing in one of my ears."

To him, that was not a serious injury, and I think part of that dynamic is not only a bit of self-denial; it is easier to believe that you are not injured, because it is easier to believe that what happened to you was not so serious. But part of that dynamic is also self-blame — "Well, it is my own fault. What was I doing on the subway that late at night where no one else was?"

Giving some examples from rape and sexual assault, a transgender woman was volunteering for a while at a nursing home. She knew a lot of people there very well. When a rumor got started that she was not really a woman, she ignored it. She thought, "These are people I know, they are my friends, and if they have a question, they are going to come and ask me."

What ended up happening was she was lured into a storage room. Her supervisor said, "There is something here I want to show you; come on in." When she got there, there was a gang of

employees who sexually assaulted her, pulling at her clothes, grabbing at her crotch, grabbing her breasts, and yelling things like, "What do you have down there? What are you? Are you a man? Are you a woman?" — calling her "an anti-man, a faggot, a cocksucker, a she-man."

There was another recent example of a man who went to a bar, met someone he found attractive and invited him back to his apartment, hoping to have a drink. The two of them had a conversation. The other man apparently had slipped some knockout drugs in his drink, and he awoke to find that he had been raped, and the perpetrator was taking his wallet off the table as he was awaking, calling him a "stupid faggot."

For victims of crimes like these, in addition to other crimes, there are often flashbacks to the incident. It may also trigger flashbacks to other incidents of violence that they have experienced. It makes very spotty memories. They may actually physically recall the violence that was perpetrated against them. They can feel the hands of their coworker grabbing at their crotch or clawing at their breasts.

Moving to an example of police misconduct, another area that we do work in, a transgender woman lives at home with the family, and her mother was concerned that she was not well and called EMS. They showed up and determined that the woman was fine. She had apparently taken some cold medicine. She left the apartment, and after EMS left, some housing police showed up. The police said, "We are looking for John Doe." In this transgender woman's family, they still referred to her by her male name, which is John Doe. Her family replied, "Oh, John Doe went out, everything is fine, we are sorry, it was a mistake."

As the police were leaving, they walked by a very attractive woman, and they acknowledged her — perhaps held the door for her — and she went over and knocked on the door of the apartment from where they just left. When the door opened, the person who answered the door said, "Oh," and called to the police and said, "This is the person you were looking for." They came back and said, "We were looking for John Doe. This is clearly not a John Doe. Look at her, she is gorgeous."

Allegedly — and I say allegedly as a good lawyer would, because there is a civil suit in the works — the police forced their way into the apartment, started calling her names like "trans-testicle, he-she, what-is-it." One officer allegedly followed her into a bathroom in the apartment and started assaulting her. She said, "Please do not

hit me in my chest and face; I had silicone implants and I have had plastic surgery." Of course, that is exactly what they went for.

People who have been victims of crimes like that may see changes in their sleeping and eating patterns. They may have nightmares. I know of people who are on dream suppressants to help them sleep through the night. Some are unable to function at work or focus on anything in particular.

I hope that gives you some sense of what these crimes look, sound and feel like. What I want to do now is throw out some ideas about the relationship between speech and violence, how they are linked, how they work together to oppress people, and then at the very end return to hate speech.

What do we mean in terms of hate speech? First, hate speech and violence are alike in the sense that they both hurt, and there is evidence that the aftereffects of hate speech are, in fact, more dramatic and traumatic than the physical violence of a victim of a non-bias crime. For example, people who are victims of a bias crime may take more than twice as long to recover psychologically than victims of similar crimes not motivated by bias. It is such a cliché, but we hear clients say all the time that the bruises heal, but the psychological scar from the words remains. Every time they hear the same hateful words, it reopens that scar.

The other way in which I think they are similar is that what we see in a lot of crimes motivated by bias is the idea of overkill. They are not stabbed once, twice or three times, but rather stabbed ten, fifteen or twenty times. It is this idea of overkill, doing more than is necessary to mortally wound a person.

There is some sense that the phenomenon of overkill comes from this idea that the perpetrator is literally trying to rub out the very existence of that person, and in some way, hate speech has that same dynamic. It is not enough to say "Is that a he-she, what is that?" The perpetrator will say, "You are a fucking trans-testicle. What is that?" They may repeat over and over the same language: "faggot, fucking faggot." Most of this stuff is not very original. You hear it over and over again. "Die, AIDS faggot." That kind of repetitive and overkill quality serves the same kind of purpose. It refuses to allow that person autonomy in how they identify.

Now I want to talk about how speech and violence work together. The way in which language and violence work together is if someone kicks you in the head and calls you a faggot, the next time someone calls you a faggot, you know what that means. You do not need someone to tell you that you are going to get kicked in

the head or if that person wanted to they could kick you in the head. The word alone carries the threat.

They work together in the sense that when speech is used and the perpetrator is very clear that they have targeted this person because of their identity, whether sexual orientation, gender identity or their HIV status.

When a perpetrator uses speech and makes it very clear why he or she is committing the crime, he or she are making it clear not only to that individual, but to the community. To give you an example, if I am mugged at the J Street subway station in Brooklyn, I am going to take a different train and get off at Clark Street instead. I am attacked and told that it is because I am an AIDS-infected loser, what am I going to do to avoid that happening again? What is any person who has HIV or AIDS going to do? That sense of security and control over your life, that you are able to change your behavior or something about yourself to make sure you are not victimized again, is a loss because, in a sense, it is a whole community that is being targeted.

Finally, I want to talk a little bit about another way in which violence and speech work together. The use of hate speech during a crime, particularly L/G/B/T/H hate speech, may alienate people from access service. For example, if I am mugged, I will go to the police station and say, "I was mugged. Here is what happened: I was walking down the street, the guy pulled a handbag off my shoulder, and I want to report it. In the process, I broke a finger, and I am going to see a doctor."

If I go to a gay bar and I meet someone and I bring them home and the minute they get in the door, they turn on me and they pull out a knife and they say, "you stupid bitch, or you dumb faggot, I am not here because I am interested in you; I am here because I want your wallet," and then they cut me on the way out the door, I am going to have to go to the police station and explain what this person was doing in my apartment. What am I going to say? "Well, officer, I am a gay man and I went to a gay bar, I picked someone up and brought him home." The officer will say, "Why did you bring them home?" I will have to reply, "I was interested in having sex with him."

If you are not out, that is not something that you are going to do. You would probably think that the police are not interested in serving you as a member of that community.

For a clearer example, let's say you are coming out of a gay bar by yourself. Suppose someone follows you and attacks you. The

fact that the speech was used may prevent you from reporting what happened.

For people of transgender experience, who are already alienated from services, particularly medical services, it is not very likely that they are going to seek medical attention. If they do not have access to regular health care and a doctor who knows them and their story, they are going to have to walk into an emergency room and explain to someone they have never met before why they appear to be a woman but anatomically are a male. Similarly, if the police generally target people of transgender experience and harass them, they are not likely to report such incidents.

Finally, I want to talk about the definition of hate speech, and I will give you a couple of examples, rather than cite a definition myself. Focusing on the transgender woman again whose wife became abusive when she decided to start acting on feelings of being a woman by dressing and living as a woman. When she decided to start living her life as a woman, she went to her employer and asked a couple of things. She said, "I would like to wear the woman's uniform rather than the man's uniform, and rather than you calling me John Doe, I would like you to call me Jane Doe."

Her employer started the conversation by saying, "I do not understand what you mean. Do you have a penis?"

The client said, "Yes, I do."

"Well, do you want the penis?"

The client said, "Well, I am considering sex reassignment surgery."

"Well, when you have the operation, how does it work? What do they do to your penis? Are you going to have breasts? How does that work?"

Then the client said, "Now that you asked me all those questions, how do you feel about my requests?"

The employer, much to my amazement, said, "Well, you can wear the woman's uniform. We cannot call you Jane Doe because your union card says John Doe, and in order to get your union card changed, you have to change a whole bunch of other identification — which, by the by, is not very easy to do. So we are not going to call you Jane Doe. We are going to call you John Doe." And they continued to do that.

This same woman shopped regularly at a grocery store in her neighborhood, and after she started dressing as a woman and living as a woman, the bag boy at the grocery store continued to call her "sir." As many times as she corrected him and said, "I am a wo-

man, please call me ma'am," he continued to call her "sir." Those examples of calling someone "John Doe" instead of "Jane Doe," asking questions or making statements like "I have never heard of someone who has a penis who is a woman," or "do you have a penis," or "are you going to get rid of your penis," calling her "sir" instead of "ma'am" — I think those things push the edge of the envelope and may have sharpened our focus of what hate speech is, even though we know it when we feel it, to try to put it into words, in the same way that the experience of transgender people in general inform the work that we do every day, making connections between discrimination based upon sex, on sexual orientation, on gender and parsing those things out and thinking carefully, thoughtfully and thoroughly about all those different areas.

Finally, the other thing I want to throw out there is the fact that a lot of times speech involves multiple forms of behavior. One of the things I would encourage us to talk about today is making connections. When someone calls you a "homo-ass nigger," what did that get them? How is that different than if they just called you "a homo" or "a nigger," and why layer those things? Why pile them up? What implications does that have for us as service providers, for us as theorists, for us as litigators, in terms of thinking about the ways in which different forms of oppression work together, the way in which language can tell us something about those connections?

MR. CHEN: Thank you, Laura. Brian Levin has worked on a number of cases that have touched on hate speech and bias crimes and has also testified in front of Congress once or twice.

I have asked him here to give us a broader view of the legislative scenery and discuss what is happening for different states, how hate crime legislation works, and also talk a little bit about the current bill that is in front of Congress that would include sexual orientation.

MR. LEVIN: Thank you. What I am going to try to do is actually frame that discussion in the last part of my talk. What I want to do first, though, is get to the nexus issue, the title of this conversation. I think that hate crime is a vitally important issue for our society and one that really warrants a national conversation.

As someone who has been very involved in public policy, and particularly with hate crimes, since 1986, I can really sense how our discussion of this issue has significantly degenerated. I have a palpable sense that we are no longer talking to each other; but rather at each other, and in some ways I think the media and the general level of discourse has oftentimes succumbed to incivility and sensa-

tionalism. That is something I am not going to dwell on here, but I do think it is important to discuss because homophobia is something that takes place not only in discreet singular events, but also in a larger context where many take advantage of using hurtful and negative stereotypes to achieve a particular political agenda.

Table 1. Hate Crime Incidents in the United States by Year[75]

YEAR	INCIDENTS	% OF TOTAL POLICE DEPTS. SUBMITTING REPORTS
1991	4558	17%
1992	6623	39%
1993	7587	41%
1994	5932	46%
1995	7947	60%
1996	8759	71%
1997	8049	70%

	TOTAL INCIDENTS	ANTI GAY, LESBIAN OR BISEXUAL (NUMBER/%)
1995	7947	1002/12.6%
1996	8759	1001/11.4%
1997	8049	1090/13.5%

I will talk specifically, though, about the intersection of hate speech and hate crime. One of the things I have always felt is that you can evaluate a society in part by how it treats two different things. The first is the level of tolerance that society has for discourse, including the kind of uncivil discourse that I just railed against. Secondly — and in no particular order of importance — is how a society reacts to diversity and to those who, by virtue of those differences, are sometimes cast in a position of being the most vulnerable in that society. At times, those interests conflict. What we have in our discussion today, I think, is the intersection of these important values.

Let me try to wear two hats here. On the one hand, I am an attorney. On the other hand, I am a professor and criminologist. I recognize that many of you will leave here saying, "Jack, why did you invite that guy," because the world is not divided up into these artificial boundaries that lawyers make, nor is it divided up into the artificial boundaries that criminologists make. With that small dis-

75. *See* FBI Uniform Crime Reports, Hate Crime Statistics Annual Report. The majority of agencies submit reports counting zero hate crime in their jurisdiction.

claimer, let me go into what I think are two of the many issues that exist with regard to this nexus.

The first thing is how far should criminal laws go to punish bigoted or discriminatory behaviors, if they should at all? Let me say in the beginning that I think there can be a non-bigoted and non-prejudiced argument that laws should not cover so-called hate crimes, and I will try to define them in a bit. I happen to be on the opposite end of that debate, but I do think one can make a principled argument on the opposite side.

Unfortunately, the last several times I have taken part in any public discourse on the topic, I did not have the benefit of principled discussion. A lot of it just devolved into a presentation of stereotypes, homophobia and a substantive misstatement as to the purposes of the criminal law.

We do punish discrimination in our society, both on the civil and criminal side of the law.[76] Now, the definition of discrimination sometimes does not get you very far. Discrimination is treating similarly situated people differently without a legal or sufficient basis. Now, if you do not think there are loopholes in that definition, there certainly are.

In addition, there are many immoral things in this society, many hurtful things, many horrible things, that we simply do not punish by the force of law. That does not mean that we as a society necessarily condone those things. The law is a very strong instrument, and I think we must be selective as to what it addresses.

The second issue, which has caused me considerable distress for a very long time is if you embrace civil and criminal anti-discrimination laws, what kind of classifications do you protect? On what basis in law? Is there any kind of fixed or definitional reason that we include race, religion or national origin in some states, but not sexual orientation, disability or gender in others? Forty-one states have hate crime laws, but only twenty-two cover sexual orientation. Those are important issues, as well, that we are going to try to get to.

76. *See, e.g.*, Roberts v. United States Jaycees, 468 U.S. 609 (1984).

Table 2. 1999: Jurisdictions With Criminal Hate Crime Statutes Covering Sexual Orientation - 22 States[77]

AZ	LA	OR
CA	ME	RI
CT	MA	TX
DC	MN	VT
DE	MO	WA
FL	NE	WI
IA	NH	
IL	NJ	

The next issue regards speech: what constitutes speech, and how far should we allow speech to go? As a general rule, speech or communicative expression that does not fall into certain unprotected categories is, in fact, insulated from punishment based on its content. In fact, since *R.A.V. v. St. Paul*,[78] even unprotected areas of speech have a minimal level of protection based on content.

The crux of this issue is that mere offensiveness of speech alone is not a basis for a proscription.[79] Interestingly, in many other parts of the world — Canada, the U.K. and Germany for instance — incitement to racial hatred or so-called group defamation laws are on the books. They are very rarely used in part because it is so hard to prosecute them. In England, for example, very few cases come up under that law.

In fact, we had laws like this in the United States during the first half of the 20th Century. At that time, laws punishing group defamation were on the books. In fact, a challenge went up to the Supreme Court in *Beauharnais v. Illinois*.[80] The Supreme Court validated the law. Since then, however, the primary legal foundations upon which the *Beauharnais* decision was based upon have been cut down, although technically *Beauharnais* has never been overruled. Since then, though, it is important to recognize that offensiveness is not a basis for punishing or preventing speech by force of law.

77. *See* National Gay & Lesbian Task Force: Hate Crime Laws in the United States, Center on Hate & Extremism <http:\\www.ngltf.org>. Texas hate crime law covers bias or prejudice against groups without identifying the actual groups protected.

78. 505 U.S. 377 (1992).

79. *See, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989).

80. 343 U.S. 250 (1952).

Nevertheless, there are certain communications that are crimes in and of themselves. Conspiracy — an agreement with another person to commit a crime, is not insulated by the First Amendment from criminal prosecution.[81] Threats are certainly punishable — nasty letters to the President about his policies are protected, but do not threaten him.[82] That is, I think, an important area of delineation. Criminal solicitation where someone requests or encourages another person to commit a crime is another example of a form of communication.[83]

In addition, speech can be used as evidence to prove intent or motive in a crime. Now, intent is the "what" of the crime, the desired purpose or the knowledge in committing the crime. Motive generally is not an element of a crime, although it certainly can be. For instance, why you break into a house can determine whether or not you get convicted of criminal trespass or burglary. If you enter the home to commit a crime inside and that is your motive, if you will, that is the heightened offense of burglary, and motive actually becomes an element to the offense.[84] So in order to make it more confusing, sometimes motive becomes a material element of an offense, depending upon how the elements of the crime are written. In any event, even if it is not an element of the crime, motive can certainly be used to determine upon conviction the severity of one's sentence.

Well, that being said, what do you do about hurtful offenses being targeted at group members, the kind that Laura spoke so eloquently about, that do not fit into these existing niches? The first thing I will admit to you is that hate speech has consequences. Hate speech, particularly about historically oppressed minorities, has an effect. It changes people's behavior. It harms them in ways that they relate to others, something particularly harmful to a democratic and pluralistic society.[85] However, the majority view on the First Amendment says we must tolerate a certain amount of bad discourse in a free society and the way to beat bigoted speech is with enlightened discourse, which leads us next to hate crime laws.

The Supreme Court decided two cases involving hate crime laws, including one that involved a cross burning by a teenaged

81. *See* MODEL PENAL CODE § 5.03.

82. Watts v. United States, 394 U.S. 705 (1969); *see also* 18 U.S.C. § 871(a) (1994).

83. MODEL PENAL CODE § 5.02.

84. *See* MODEL PENAL CODE § 221.1-2.

85. *See, e.g.*, Charles Lawrence, *Is There Ever a Good Reason to Restrict Free Speech on a College Campus? Yes.*, THE STAN. LAW. (Fall 1990).

skinhead, the *R.A.V. v. St. Paul.*[86] In that case, the cross burning law at issue punished only certain types of cross burning that were used to express certain views. It did not punish all cross burnings that were used to terrorize people, but only those cross burnings that communicated certain types of bigotry deemed unacceptable by the city. The Supreme Court in essence said, "You cannot do that. If you burn a cross on a black family's lawn to express racial hatred, that would be a crime, but if you are burning a cross at a home for mentally ill people, a category of the law left out, that would not be punished. No, we are not going to allow that, because the criminality hinges on the bigotry, hinges on the prejudice, rather than the underlying terrorist act and we do not want to punish people for their prejudice."

The next year, the Supreme Court was asked to rule on a different type of law that was better drafted. The law at issue in *Wisconsin v. Mitchell*[87] punished the intentional selection of a crime victim based on a particular group category, such as race or sexual orientation. This kind of discriminatory selection resulted in an enhanced penalty to be added on to the punishment for an underlying crime.

Well, the first difference between *R.A.V.* and *Mitchell* is that you had to commit a crime first with Wisconsin's law in order to be punished. So that was one thing. The second thing is the prejudice was not the primary target of the Wisconsin law; but rather the discriminatory selection of a crime victim. Interestingly, if there was a gay offender that went around beating up gay people, wore a mask, and said homophobic things to promote gay solidarity in the city, he would be a hate offender, and his actions would be punishable, irrespective of the fact that he did not have the kind of animus that we usually think of with violent homophobes.

Therefore, discrimination is an act that can be punished.[88] It is treating someone differently. While the prejudice that leads to it cannot be punished, the act of discrimination itself can be.

Well, let's look at the kind of laws we have on the books, so I can close with that. There is no one type of hate crime law. However, the most broadly applicable laws fall into two categories.

The first type is the intentional selection style statute I just spoke of, where intentionally selecting a crime victim based on their group status is punished. That is one type.

86. 505 U.S. 377 (1992).
87. 508 U.S. 476 (1993).
88. *See, e.g.*, Roberts v. United States Jaycees, 468 U.S. 609 (1984).

Another type is the stand alone civil rights type statute, which punish the interference with someone's civil rights through force or threat. Some also add protected group categories such as race, religion, sexual orientation — that is another of the most broadly applicable kind.[89] This type of law does not require the charging of an additional offense.

But there are many other types of state laws, which unfortunately time does not give me the ability to go over right now.

Unfortunately, there is no broadly applicable federal hate crime law. There is the Sentencing Enhancement Act of 1994 of the Violent Crime Control and Law Enforcement Act of 1994,[90] which does cover sexual orientation, but you have to commit an underlying federal offense first, of which there are a limited number. So if you "gaybash" in a post office or a maritime vessel, the crime is covered. But not on a military base, apparently, since the Uniform Code of Military Justice does not have a hate crime provision.

There are also separate federal criminal civil rights laws that cover various things, such as conspiracies[91] and housing.[92] There is a thirty-one year-old law that covers race in certain civil rights deprivations.[93] It covers religion and national origin with a smaller number of violent deprivations. These protected rights are crisscrossed to certain protected groups. So if you attack someone because of their race because they want to vote, or because they were going to serve on a jury or something like that it would be covered, but not if you were gay. It is very convoluted and quite stark as to what gets covered and what does not.

The latest bill, the Hate Crime Prevention Act of 1999,[94] changes existing deficiencies by amending section 245 of title 18 of the United States Code 245 to protect on the basis of gender, sexual orientation and disability. It also includes a requirement involving a nexus to interstate commerce in order to fully establish federal jurisdiction over criminal civil rights offenses involving those added categories.[95] The Supreme Court consistently relied upon a showing of Congress' constitutional authority in upholding antidiscrimination laws and it is usually hooked into the Thirteenth

89. *See, e.g.*, CAL. PENAL CODE 422.6 (West 1999).
90. Pub. L. No. 103-322 § 280003 (1994).
91. *See* 18 U.S.C. 241 (1994).
92. *See* 42 U.S.C. 3631 (1994).
93. *See* 18 U.S.C. 245 (1994).
94. S. 622, 106th Cong. (1999); H.R. 1082, 106th Cong. (1999).
95. *See* United States v. Lopez, 514 U.S. 549 (1995); Bronkala v. Virginia Polytechnic & State Univ., 935 F. Supp. 772 (W.D. Va. 1996).

Amendment and the Commerce Clause. So presumably the Commerce Clause can be construed to empower Congressional action because if you beat up a gay person, that would stop that gay person from coming to that state or that city to engage in commerce. This proposal was a just defeated on Capitol Hill.

New York State does not have an adequate hate crime law.[96] It has a provision called aggravated harassment, which is, again, probably the most ineffective hate crime law in the United States, if you call it a hate crime law at all.

New York State does not have a hate crime law that covers sexual orientation. About twenty states do. Interestingly enough, this year Colorado,[97] Wyoming,[98] Idaho[99] and Utah,[100] have all failed to enact new hate crime laws or amend existing laws to cover gays. The debate has been degraded by, I think, two things: homophobia on the one hand and, on the other hand, a misrepresentation of the actual severity of hate crime.

Hate crimes are more likely to involve assault; these assaults are more likely to involve injury; they are more likely to involve copycat offenses, retaliatory crimes; they are more likely to involve strangers, imprecise weapons of opportunity, multiple assailants — all objective measures of severity.[101] When you inject the homophobia into things, however, it becomes a debate or a referendum on the theology of how it relates to gay rights.

In closing, I think it is important to recognize that this is not simply a gay, lesbian or transgendered issue. It is a human rights and civil rights issue. This is an issue that I have been working on for more than fourteen years to try to get these important laws passed, and to show how these crimes are more severe. But, again, I think we are losing something if we say we merely want these laws because they involve more assailants and because they involve imprecise dangerous weapons of opportunity. I think it is also an attack of moral violence on a pluralistic democracy, because if there is one thing that the United States, and hopefully the Fourteenth Amendment, should stand for is the notion that no matter

96. N.Y. PENAL LAW § 240.30-31.

97. *See* H.R. 1074, 62nd Leg., 1st Reg. Sess. (Colo. 1999).

98. *See* S. 84, 55th Leg.; H.R. 117, 55th Leg. (Wyo. 1999).

99. *See* H.R. 36, 55th Leg; 1st Reg. Sess. (Idaho 1999).

100. *See* S. 34, 54th Leg., Gen. Sess. (Utah 1999).

101. *See* J. LEVIN, J. MCDEVITT, THE RISING TIDE OF BIGOTRY AND BLOODSHED: HATE CRIMES (1993); B. Levin, *Hate Crimes: Worse by Definition*, 15 J. CONTEMP. CRIM. JUST., Feb. 6, 1999.

what group you are in, you are entitled to the basic dignity and civility of life in a free society.

That is why a hate crime is different. In the same way, as when a witness is attacked in a mob criminal trial, it is not just an attack on that particular individual, or when a police officer is attacked or when the President is assassinated. There is a symbolic significance to these crimes which makes these crimes acts of terrorism, and in that way, even if they were no more serious from a criminological standpoint, I think that heightened punishment would be warranted, because I believe that it shakes the very basis and foundations of a pluralistic society.

I want to give you a Web site, www.hatemonitor.org, and thank you so much for giving me the privilege to come here and hopefully rekindle the kind of national conversation that we need so that people of goodwill can make sure that these kinds of statutes are passed and enforced to protect all those who reside within our society. Thank you.

MR. CHEN: Thank you, Brian. Lastly, I have asked Jack Battaglia to come and speak, because one of the things I noticed after the Matthew Shepard incident[102] was the discussion in the media about the types of hate speech that happens on college campuses, as well as in high schools. We have the infamous "scarecrow incident" on the float of the college fraternity, just to name one of the more highly publicized incidents.[103] I have asked Jack to come talk about what is going on right now in the legal field with respect to students who face hate speech, who suffer such incidents in schools, and who is responsible and what are the remedies.

MR. BATTAGLIA: When I realized I was going to be the last speaker on the last panel for the day, two things occurred to me: the first, that I had better not speak too long and, secondly, that maybe this was a special responsibility. Then I realized that my topic, which is antigay harassment in schools, provides a very convenient opportunity to close the circle on some of the things that were talked about during the plenary session this morning.

The answer that Matt Coles, for example, gave to the question that was put to him about his priorities for our movement — of the three he mentioned, one was schools. As the discussion progressed, there was a focus on the relation between law and culture and, in particular, the limitations of law to make changes in

102. *See supra* note 4 (discussing the incident).

103. *See CSU Students Protest Anti-Gay Incident on Campus*, ASSOCIATED PRESS NEWSWIRE, Oct. 19, 1999.

culture; how, instead, sometimes the changes in culture have to come first; If there is any institution in our country in which cultural battles take place, it is the schools.

In fact, certainly at the lower educational levels (elementary school through high school) the educational mission includes transmitting values to students — cultural values — that represent civic virtue. There is always significant vying among people in the community about just what those values will be and how they will be transmitted.

Another theme of the plenary session was how, as lawyers, we have to follow our community in terms of the needs and interests that we pursue in what we do, whether it is in litigation or legislation, or other arenas of advocacy. It is quite clear that in the area of antigay harassment, there is a reluctance to litigate on the part of parents of students who have been harassed. There are a number of reasons for this reluctance, most of which I bet you can suspect and would understand.

So a possibility for reaching the result a different way, perhaps, is something that should be at least part of the goal, and part of that is a recognition that what we are trying to do, what advocates are trying to do, is not only to provide compensation or other remedies for the particular individual in the particular circumstance, but to make the offensive behavior stop, and to make it stop not only at the institution at which this particular individual has been harassed, but to make it stop throughout the system.

With that, my focus is going to be on a couple of avenues of available redress that are directed to school districts and schools as opposed to the individuals who are the actors in antigay harassment. For example, I am not going to talk about generally applicable criminal laws or hate crime laws that might be available to punish the particular offender; nor will I talk about state tort remedies that may be available to provide some redress.

Instead, I am going to talk briefly about two federal remedies: the possibility of action under Section 1983 of the federal civil rights laws[104], and under Title IX of the Education Amendments of 1972.[105] Then, I am going to talk a little bit about how the First Amendment might limit the ability of schools and school districts to restrict the harassment that we would like to see eliminated from the school system.

104. 42 U.S.C. § 1983 (1994).
105. 20 U.S.C. § 1681 (1994).

There was extensive discussion during that session about the *Nabozny*[106] case, which was a Seventh Circuit decision rendered under Section 1983, in which a young man who had been subject to years of harassment through both middle school and high school was able, after a jury verdict of liability, to negotiate a settlement of slightly under $1 million, for the harm that was done to him when the school authorities literally ignored his and his parents' complaints about the harassment.

Very briefly, that case was based on Section 1983 for the deprivation of constitutional rights under the color of state law. Only public schools are subject to suit under Section 1983 to the extent that the basis for the violation is a federal constitutional right, because, as you know, only governmental actors can violate the Constitution.

The claims that were asserted in *Nabozny* were of two types, based on two separate provisions of the Fourteenth Amendment: the Due Process Clause and the Equal Protection Clause. I will deal with the due process claims quickly because they have not been successful, not only in this context but generally. The due process argument is essentially that there is a liberty interest in being free from harm, which is deprived without due process of law when an educational institution does not act to protect students from harm, particularly after being put on notice that harm is occurring.

The Supreme Court's jurisprudence generally under the Due Process Clause makes it very difficult to establish a duty on the part of an educational institution to protect a student from third-party harm, and in fact, those claims were unsuccessful in *Nabozny*. I mention the clause, however, because there is always the possibility, given other factual circumstances, that a due process violation could be established. So it is something you should look at.

The *Nabozny* case was ultimately decided in Nabozny's favor under the Equal Protection Clause, and the nature of the denial of equal protection was twofold. The court found that Jamie Nabozny was deprived of equal protection because of his sex in that the school district treated claims of harassment from male students differently than they treated claims of harassment from female students.[107] So there was intentional discrimination, based on sex, that was redressable under the Equal Protection Clause through Section 1983.

106. Nabozny v. Poalesny, 92 F.3d 446 (7th Cir. 1996).
107. *See id.* at 454-55.

Perhaps more significant in the long term, Nabozny was also able to establish a deprivation of equal protection based upon his sexual orientation. The court relied on *Romer v. Evans*[108] as establishing a new paradigm in federal constitutional law in the area of sexual orientation, soon to overshadow *Bowers v. Hardwick*.[109] The basis for the claim that the school district acted intentionally to discriminate against Jamie Nabozny based on his sexual orientation was statements that were made by the school authorities when he complained — statements like, "well, what do you expect? If you are out, if you act gay, you can expect that you will be harmed." The court found that the statements established that the school authorities acted with a discriminatory motive with respect to Nabozny's sexual orientation.[110]

Before I go any further, one of the important reasons why I highlight these federal causes of action is that, unlike most remedies under state law, you can obtain attorneys fees if you are successful with a 1983 claim or a Title IX claim, and that is quite significant.

Moving onto Title IX, the statute prohibits discrimination because of sex in educational programs that receive federal funding.[111] Since virtually all schools and school districts, public and private, receive federal funds, there is a possibility of an action under Title IX; but here the argument gets a little bit more attenuated. The argument is that antigay harassment, at least of certain kinds, is in the nature of sexual harassment, and that sexual harassment constituting discrimination because of sex, is redressable and subject to remedy under Title IX.

The Supreme Court of the United States is currently considering whether, in fact, Title IX provides a remedy for what is called student-on-student or peer harassment, as opposed to teacher-on-student harassment, and that ruling may preclude the possibility of an action for damages.[112] However — and this may be even more important than the attorneys' fees point — Title IX is enforced by the Office of Civil Rights of the Department of Education, and there is an administrative proceeding, an administrative remedy, that can result in the loss of funding to a school district if the school district does not take action to remedy a situation that involves sexual har-

108. 517 U.S. 620 (1996).

109. 478 U.S. 186 (1986).

110. *See Nabozny*, 92 F.3d at 460.

111. *See* 20 U.S.C. § 1681(a) (1999).

112. *See* Davis v. Monroe County Bd. of Educ., 119 S. Ct. 1661 (1999) (holding that a private cause of action for damages is available).

assment. Moreover, the Department of Education has been willing to recognize that antigay harassment can be sexual harassment that is covered by Title IX.

However, the guidelines make a very strange distinction between general antigay harassment and harassment of a sexual nature. If the harassment is of a sexual nature, even though it is antigay harassment, it is sexual harassment covered by the statute. But, if the antigay harassment does not have a sexual component — that is, if it is harassment just with a sexual orientation cast — then it is not covered. The reason it is not covered is because the statute does not prohibit or provide a basis for redress of sexual orientation discrimination. Only sex discrimination is covered by the law, so there is a little bit of sleight of hand going on there.

Moving onto the First Amendment question, the *R.A.V.* case[113] that Brian talked about is often used by those who would resist attempts to take action against harassment based on group membership as standing for the proposition that this kind of harmful speech/behavior is protected First Amendment activity. The context of *R.A.V.*, as Brian told you, was a cross burning, and the case is sometimes characterized as holding that cross burning is protected by the First Amendment.

But *R.A.V.* did not hold that cross burning is protected by the First Amendment; *R.A.V.* only held that a particular statute, drafted so as to cover cross burning only, when it is used to effect a certain response because of race, was unconstitutional on its face. Justice Scalia went out of his way in the very first paragraph of the majority opinion to point out that there were all sorts of other statutes that legitimately could prohibit and penalize and criminalize the cross burning that took place in that case; in fact, he pointed out that there was another charge, which was not being challenged, on which these individuals were convicted because of the cross burning.[114]

Another point about the *R.A.V.* case is that Justice Scalia distinguished the criminal statute in that case from action taken to remedy Title VII, i.e., employment discrimination actions, including those based on sexual harassment. Justice Scalia carved out from the thrust or the effect of the opinion conduct, i.e., discriminatory harassment, even when comprised of speech, that would be redressable under antidiscrimination laws — which would also

113. *See* R.A.V. v. St. Paul, 505 U.S. 377 (1992).
114. *See id.* at 370-80.

cover Title IX or any other law that prohibits discrimination, including discrimination based on sexual orientation.[115]

Another important point on the First Amendment is that the Supreme Court has developed a somewhat separate jurisprudence for the application of the First Amendment in schools. Beginning with a case most of you are probably familiar with that goes back to the Vietnam protest era, the *Tinker* case,[116] the Court has held that high school authorities may censor or sanction student speech when it substantially interferes with order or discipline or with the rights of other students.

Subsequently, in *Hazelwood*,[117] the Court relaxed even that standard for school-sponsored speech, or speech which takes place in a context that somebody could think constituted endorsement by the school, such as in the classroom or in programs that are part of the curriculum. In those cases, the Court said that the school can take action that is reasonably related to legitimate pedagogical concerns.

Well, it seems to me that there is an extraordinary amount of room there, both under the *Tinker* formulation, which is a little bit more stringent, and the Hazelwood formulation, for penalizing antigay harassment in schools.

A qualification on that conclusion is that, above the high school level, with respect to colleges and universities, the Supreme Court — and courts generally — have shown a greater reluctance to authorize restrictions on speech. The notion of the university as a place where people come in order to exchange ideas, in order to find truth and develop truth, is the countervailing consideration. Another aspect, of course, is the age of the students. It is considered more likely, as we would expect, that the role of the school would be more protective, and legitimately more protective, at the lower levels than on the university level.

Again, what is important about the *Tinker/Hazelwood* formulation in the lower grades is that it explicitly recognizes that schools have a role in teaching civic virtue and teaching the values of our dominant society, which includes teaching tolerance and the right of students to be free from harassment.

115. *See id.* at 389.

116. Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969).

117. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

NAME REPORTING AND PARTNER NOTIFICATION LEGISLATION

MS. COOPER: I am Liz Cooper. I teach here at Fordham. The panelists we have this afternoon are absolutely wonderful people. I will introduce them in the order that they are going to be speaking in. Catherine Hanssens is the director of the AIDS Project at Lambda Legal Defense and Education Fund. Matthew Carmody is an attorney with Brooklyn Legal Services. Haley Gorenberg is with The Legal Support Unit of Legal Services for New York City. Mildred Pinot is an attorney with the Legal Aid Society, herself with the Volunteer Law Office.

MS. HANSSENS: Thank you, Liz.

The issues of names-based HIV reporting and partner notification have been debated for some time, but the debate picked up heat over the last year. A focal point of that debate has occurred in New York, which adopted in 1998 a law mandating names reporting and partner notification.[118]

Although the law was scheduled to go into effect in January, 1999, final regulations implementing the law have not been issued. The law is vague or ambiguous in a number of important respects, and until we see the interpretation from the health department, we do not know exactly what the law will mean for people in New York with HIV who are contemplating getting testing.

The panelists here today thought it might be helpful to say something about why names reporting has become the debate that it has; why the Centers for Disease Control and Prevention ("CDC") has been pushing so hard for this, and how we think you should assess whether this kind of a program makes sense, focusing also on what the pros and the cons are. We also will address specifically how name reporting and partner notification are treated under New York law. Finally, we will discuss how those of you who might either be contemplating getting tested or who work with clients that might deal with the new law.

For the last several years, the CDC has been waging an aggressive campaign in states around the country to institute a national system of HIV test reporting. The CDC takes the position that names-based reporting is essential to get a more accurate picture of the epidemic. The CDC also contends that names reporting will be used to facilitate individual follow-up, so that health departments can track people supportively and get them into services.

118. *See* N.Y. PUB. HEALTH LAW § 2130 (McKinney 1999).

The CDC suggests that this names reporting initiative reflects broad community input and consensus. Contrary to what the CDC says there has not been substantial, meaningful community input into the CDC's recommendations for HIV surveillance, and in fact, it was very difficult for advocates — and impossible for people on the streets — to get copies of the CDC's proposed guidelines until they published it in December, 1998.

Basically, the CDC is proposing that states adopt a system that reports positive test results; they suggest this system should mirror the way AIDS reporting is done, which in all fifty states at this point is by name, as it has been for some time. While they do allow states the option of adopting what is called a "unique identifier system," which means that instead of using names, you can use some kind of a code, the proposed guidelines question the effectiveness of a unique identifier system and indicate that funding will hinge on a high rate of accuracy for reported data. In several states, unique identifiers for HIV reporting are a combination of initials, birth date and a portion of the individual's Social Security number. But there certainly is no universal, single definition of unique identifiers. Consider, for example, that anybody here who uses the internet also has a unique identifier for that purpose. Obviously, it is relatively easy to create a unique identifier system and that allows assignment of accurate, individualized codes while millions of people use a system at one time.

The CDC, nonetheless, is really actively discouraging any alternative to names-based HIV reporting. The CDC is making it clear that they may hinge the availability of federal money for HIV surveillance on a state's adoption of the CDC's preferred system. At the same time, however, while they explicitly recognize that the option of anonymous testing is essential to ensure that the maximum number of people are willing to get tested, the CDC refuses to withhold federal dollars from states that adopt laws to make anonymous testing unavailable. So far, eleven states that have names reporting also have banned the option of anonymous testing.

I, along with most advocates of people with HIV, believe that the CDC's proposal for names reporting is ill-advised and that it does not advance the public health goals that it is intended to serve. A primary objection to names reporting is that it threatens people's confidentiality, or more importantly, that there is a strong perception among people at risk of HIV that it will discourage many people from getting tested altogether.

While a number of the studies of the impact of names reporting on willingness to test are somewhat flawed, the clear majority of studies that have attempted to assess this indicate that a significant number of people will be deterred from getting tested if they have to give their name or if they feel the result could be tracked back to them. Most importantly, those who object to or who worry about names reporting are disproportionately people in already marginalized communities: people who are gay, people of color, IV drug users and at-risk youth. The primary goal of any health official in this epidemic has to be to increase testing, treatment and prevention. A reporting system that undermines this essential goal is simply bad public health policy.

The current estimates are that up to 900,000 people in this country are living with HIV, with at least 40,000 new infections every year; CDC reports make it pretty clear that these new infections occur disproportionately among younger people, particularly among young gay men, women with substance-abusing partners, people of color and those who use drugs intravenously.

When we are trying to assess the efficiency of a public health program, we need to get a sense of where the new infections are occurring and whether the public health measure that is supposed to deal with this is going to be more productive than destructive in accomplishing the goal.

HIV testing and counseling is described as central to the CDC prevention efforts, and yet the current estimates are that roughly forty to fifty percent of 900,000 people with HIV in this country have not been tested.

HIV, like many other frightening and expensive diseases, has always involved significant social risk as well as medical and public health risk, and historically people with stigmatized diseases — in the past, it was TB, STDs, syphilis — have been marginalized and demonized. What is happening with people with HIV is nothing new.

That type of social risk can and does deter people from getting diagnosed and treated. There is social science data that supports this premise, so there is a historical and current reason to be concerned.

In order to understand the impact of reportable HIV testing and whether the good outweighs the bad, we have to have the sense of the actual prevalence of harmful attitudes towards people with HIV, actual harmful policies aimed at people with HIV and some understanding of the subjective perception of individuals who are

at risk of the harm to them if they are identified as having HIV. We can look at the laws that are in existence, we can look at the available evidence of stigma and attitudes, and we can try to get a sense from that.

A recent study published in 1998 by research psychologist Gregory Herek showed that by comparing a 1998 survey of peoples' attitudes about HIV with an identical survey conducted eight years earlier, the level of stigma and misunderstanding that people have has remained relatively constant, and actually in some areas has increased. A substantial number of people across all sorts of economic and educational backgrounds and experiences are uncomfortable working with people with HIV, using a glass that somebody with HIV has used, even if it has been sterilized, wearing a sweater of somebody with HIV even if it has been dry-cleaned and believe that they are at risk by driving in the same car with people with HIV. The risk is real.

One of the primary problems in looking at what this will accomplish will actually give a better picture: if about fifty percent of those people who are infected are not voluntarily testing, and we have reason to believe that stigma and suspicion, political and medical system are still high, will we get accurate data?

I think we have very good reason to believe that names reporting will yield faulty data and, if anything, give us a very skewed and dangerously skewed, picture of who is infected, because if we rely on voluntary testing — people voluntarily going forward — and we have a fear of stigma and a fear of punishment, then we are going to disproportionately leave out those populations I mentioned before that have been traditionally marginalized. In fact, the CDC has produced no data to suggest that names reporting will accomplish the goal of getting a better picture of the epidemic.

In addition, names reporting is not necessary to allow follow-up with individual patients. Even with a unique identifier system, it is possible to do a backward track through reporting physicians to reach individual people. The truth is that the CDC has rarely used names-reporting data to accomplish such tracking, and in a well-constructed system where you get the needed epidemiological information up-front, you rarely need to backtrack. The likelihood that there are going to be extraordinary and new means of transmission that we need to track is only going to become increasingly unlikely.

I have tried to identify some of the issues raised by names reporting. I laid out for you some of the issues you should be think-

ing about as the next panelists talk about what is planned here in New York.

MR. CARMODY: I am going to talk to you about partner notification. First I will give you some historical and theoretical background to partner notification, and then discuss how partner notification has been applied to HIV and what some of the problems that result are.

Partner notification is a public health measure, which are actions the state imposes upon society to protect it from public health risks like communicable diseases. There are many public health measures in existence today, such as receiving a simple flu vaccine to being quarantined for tuberculosis. However, most public health measures impose to some degree a restriction in a persons constitutional right to liberty under the Fourteenth amendment.

The legal authority for states to exercise their public health measures was set forth in the 1905 Supreme Court case *Jacobson v. Commonwealth of Massachusetts*.[119] This case was about a challenge to Massachusetts's mandatory small pox vaccine, citing that it was a violation of the plaintiff's personal liberty. The court describes in dicta how states have reserved for themselves a "police power" through which state public health measure are implemented. This " police power" was indirectly reserved by the states during the Constitutional Convention, as they did not delegate this power directly to the federal government. This "police power" allows the states to protect and preserve their populations apart from the protection provided by the federal government. Partner notification is just another example of the State exercising its police power to protect its populations from communicable diseases.

Partner notification originally started back in the 1930s by the then-Surgeon General Thomas Parran. Originally called "contact tracing," partner notification was envisioned after antibiotics were discovered as a cure for syphilis so that the state could more directly bring the cure to infected people, rather than waiting for the infected people to discover their infection and seek treatment. Surgeon General Parran wanted every case of venereal disease to be located, reported, its source ascertained and all contacts then informed about the possibility of infection, provided a Wasserman test (a test for venereal disease), and, if infected, treated. In seeking out infected people this way, the state could prevent transmission of Syphilis before people developed symptoms and thus

119. 197 U.S. 11 (1905)

realized their infection. There is a very good book by Gabriel Rotello called *Sexual Ecology*,[120] which examines more closely how diseases such as HIV spread through communities, and how communities can either foster or deter disease transmission.

Although partner notification's primary purpose is to stop the spread of communicable diseases, primarily venereal disease, it also has the secondary purpose of treating infected people. Although this was not really stressed with other sexually transmitted diseases in which partner notification was used, such as syphilis, gonorrhea, chlamydia, etc., because you could always cure a person with antibiotics when he or she discovered his or her infection. You will see with HIV how this secondary purpose becomes more and more important, especially as scientific theories are increasingly suggesting that early treatment of HIV is essential to a longer life after infection.

Applying partner notification programs to HIV infection and transmission is different from other diseases in several respects. One, there is no cure for HIV. Therefore, even if they notify someone of their infection, the state cannot prevent further transmission by this individual with a shot of penicillin. The only way the State can prevent is by encouraging a behavioral change in the individual: meaning counseling and educating the person how to prevent him or her from transmitting the virus to other people, and hoping that this person they have spent so much time and money on will listen and obey. Unfortunately, since HIV is primarily transmitted by sex and intravenous drug use, it is hard for people to simply listen and obey, because sex and drug uses involves a whole host of physiological and psychological pressures and variables that the state is not really able to or prepared to deal with for effective behavior modification. Therefore, after a person is contacted through a partner notification program, whether that person further transmits HIV to others really depends on the person and their situation. This is a lot less effective than a shot of penicillin for a syphilis infection.

The second variable is that HIV has a really long incubation period. It takes three to six months after infection before a person even starts producing antibodies, and it takes up to 10 years and more before someone might develop symptoms. It is very difficult for people to remember who they have exposed to HIV for such a long duration of time. Most partner notification programs limit the

120. GABRIEL ROTELLO, SEXUAL ECOLOGY: AIDS AND THE DESTINY OF GAY MEN (1997).

partners they are willing to contact to people who have been exposed only a year or two ago. But even here, it may be very difficult for people to remember all their sex and needle sharing partners in the previous two years, much less to provide a state with identifying information about these people. This is very different than diseases like syphilis and gonorrhea where symptoms usually manifest within a week to ten days, as it is much easier for people to remember who they had sex with last Wednesday, for instance, and the probable whereabouts of that person now.

Economically, this long incubation period has real ramifications. It has been estimated that it takes upward of $5000 to perform one partner notification on average.[121] This is primarily due to the amount of work it takes to track a person down whose identifying information is either very sketchy or is outdated. People who perform HIV partner notification must do things like comb shooting galleries and homeless shelters looking for the named contacts. This takes a lot of time and money. As endorsers of HIV partner notification have pointed out, this is still a lot less money than it takes to treat a person with HIV over the duration of their lifetime, so there is still a cost benefit to running partner notification programs. However, I think it is important to question how existing prevention efforts would be affected if all that money was poured into education, counseling and testing programs, rather than into partner notification.

HIV is also different in the social treatment of those infected. Possible discrimination, violence and de-racization await those who are infected. There is also an inherent distrust of the state to protect infected individuals from these harms. Partner notification programs generally rely on the cooperation of the participants to provide information in which the program can function. It may be very hard for people to give up this information, thinking that the contact may figure out the informant's identity and seek some sort of revenge.

This leads to the question of whether mandatory HIV partner notification could be considered an invasion of privacy. The type of privacy which frames this issue is really that of informational privacy, because we are talking about controlling the use of a person's HIV related information – whether this HIV related information can and should be disclosed in a limited form to a person's contact via the State. It is different than the privacy issue at issue

121. *See* Cheryl Ellenberg, *HIV Partner Notification Activities in New York State: A Comparative Analysis – Executive Summary*, AIDS Institute 4 (1996).

in *Jacobson* because the State action involved in that case involved the person's bodily integrity, not what happens to the information of the person's status as being or not being vaccinated.

One of the primary cases involving informational privacy is *Whalen v. Roe*.[122] This U.S. Supreme Court case challenged a New York statute mandating the reporting of all prescriptions for controlled substances, along with the name of the prescribing doctor, dispensing pharmacy and patient receiving the drug to the N.Y. Department of Health. The challenge was based on the assumption that people would not go to their doctors to get necessary health care if they thought their name was going to be on some list in the Department of Health as someone who receives a prescription for controlled substances. The Supreme Court said that there were two interests involved: an interest of avoiding disclosure of personal matters, and an interest in independence of making certain kinds of important decisions. The Court held that these two interests were adequately safeguarded by the Department of Health, and therefore there was not privacy infringement. However, you might imagine some argument in which these interests are not adequately protected by the Department of Health when applying this standard to mandatory HIV partner notification.

Another important case dealing with informational privacy is *Nixon v. Administrator of General Services*.[123] This case was brought by Nixon to prevent the government from going through his private tapes, stating that there were personal conversations recorded on them and therefore mandatory disclosure should be considered an invasion of privacy. The Court applied a balancing test, weighing the expected privacy against the public interest in such an intrusion. Since the overwhelming majority of the content of the tapes was not personal, and the personal information would not be widely disclosed, the Court held that his privacy interests were not Constitutionally violated. This standard would be less useful in a facial challenge to a mandatory HIV partner notification law because even though the expected privacy of a person's HIV status is high, the public interest in this information would probably be considered even higher, particularly when the name of the HIV infected person would presumably be kept confidential.

I see I am out of time. I just want to emphasize the dis-empowering nature of mandatory HIV partner notification law. HIV affects mainly people who are in traditionally marginalized

122. 429 U.S. 589 (1977).
123. 433 U.S. 425 (1977).

populations, namely people of color, gay men and substance abusers. Mandatory HIV partner notification further disadvantages these populations by subjecting them to liberty infringements and consequently possible discrimination, harassment and violence. It is hard to believe that states are subjecting their citizens to such effects when partner notification is marginally effective when applied to HIV and other HIV prevention programs that are not disempowering in nature could be just as or more effective as partner notification with a comparable increase in funding.

MS. GORENBERG: I would like to spend some time talking about the actual law that is to be implemented in New York.

As has already been said, we are waiting for the regulations that will give us some detail about how this law is actually going to go into effect. They are overdue. We have been told that we will have an opportunity for comments, that they will not be instituted as emergency regulations. In fact, we had thought as panelists that we might have them some time this week and be able to discuss what we saw in the regulations that were proposed.

Since there will be a comment period and we have an opportunity to participate in that, what I would like to do is go over some sections of the law and identify what I consider to be some hot spots to watch for implementation and regulatory effect.

The law that we are talking about here that combines these two elements, names reporting and contact tracing, is a new Title 3 of Article 21 of the Public Health Law, Sections 2130 and about ten sections following. It was enacted on July 7, 1998, to take effect in 180 days, which have now elapsed.

The law has two parts. One of them is the so-called "names reporting" — and I will tell you why I am saying "so-called" in a moment — and the other piece is the contact tracing or partner notification piece.[124]

Starting with names reporting, the first thing that is interesting to note about this statute is that the law itself does not say that names must be reported. When it talks about the index patient, the HIV-positive person, it says that information identifying the index patient is to be reported, as well as the names of the contacts.[125] Well, clearly the legislature knows how to use the word "names." They used it to talk about the contacts. But in the phrase preceding, they talked about "information identifying the case."[126] This

124. *See* N.Y. PUB. HEALTH LAW § 1230-1239 (McKinney 1998).
125. *See id.* § 2130.3.
126. *See id.*

brings to mind — it certainly brought to mind for a lot of us who wanted to comment on this law — the possibility that a unique identifier system would be possible and that there was nothing in the law that prohibited its use. We said that in our comments, and we hear that it probably is not going to be well-received and that actually some of the people who were pushing the law up in the state government were not too pleased to see that possible interpretation.

So, in a political world I would say that we do not have high hopes of seeing a unique identifier system coming out of this particular law, but we certainly made the argument, the argument is there to be made, and maybe we will be pleasantly surprised.

The other thing I would like to say about the names reporting issue is to highlight the fact that this law preserves anonymous testing. It very clearly preserves anonymous testing,[127] which makes a lot of sense in a public health context, if this is really going to be at all taken seriously as a public health law, since we know that some people will not get tested unless they have an anonymous option. We consider that to be a very important thing for people to know, for advocates to know, and anybody working with a population that is taking the possibility of testing seriously to know: anonymous testing does still exist in the State of New York and is specifically preserved.

The duty to report under this law is a duty on behalf of physicians, anybody else who is authorized to diagnose HIV or related illnesses and laboratories.[128] What those entities have the duty to report, according to this law, is an initial determination or diagnosis of HIV, HIV-related illness or AIDS.[129] Now the duty to report AIDS already existed in other law, but I want to call attention to this issue of the initial determination, or diagnosis, and also talk about the fact that we have read that together with the preservation of anonymous testing.

One of the arguments that advocates have made —and it remains to be seen whether the regulations will reflect — is that if we know that the preservation of anonymous testing is very important to the public health, because some people will be deterred from testing and getting diagnosed early if they are not given the opportunity for anonymous testing, and we have a law that says very clearly in three places that the duty to report applies to initial test-

127. *See id.* § 2138.
128. *See id.* § 2130.1.
129. *See id.* § 2130.1(a)-(c).

ing and initial determinations and initial diagnoses,[130] then I would certainly argue that somebody who enters the health system through anonymous testing for an initial diagnosis or determination and at that point goes for follow-up treatment or confirmatory testing could logically be excluded from the reporting requirements. That would be an extremely valid public health decision to make, especially when you see that the law recognizes the preservation of anonymous testing as an important public health measure. Again, a hot spot to watch for in the regulations.

I want to put all of these points that we are making about reporting and names and lists in a little bit of context here.

People have already mentioned stigmatizing diseases and stigmatizing infections and the effects on populations that are already undeserved in many ways. We have already noted that it seems that people who are deterred from testing are also disproportionately the people who are very often at greatest risk for HIV infection, and that that is a very dangerous intersection.

There are two more points that I want to mention as far as context when we talk about names reporting, lists and what it means to our clients or to patients or to any of us to be on these lists and reported and in databases.

My first call that I got for advice as the HIV Advocacy Coordinator at Legal Services was from somebody who said that he had just found out that his confidentiality had been breached, because he had met a guy at a bar the week before, and it turned out that this person worked at the Division of AIDS Services and Income Support, the public assistance source for people with HIV in New York City. They went out on a date, and a couple of days later he got a letter from this government employee revealing that this person had used his position to look him up in the database, saw he was receiving services associated with his HIV, and wrote on the outside of the envelope that the caller was HIV-positive, and how terrible it was that he had not disclosed this on the date.

Lists and databases can be used in scary ways. There are real-life examples. It is not just that we are saying that there is a theoretical potential. I mean, the questions of who has access, whether they are qualified people, people who understand confidentiality or might be inclined to use information for their own reasons, are very serious. I have seen it put into play in the real world.

130. *See id.*

The other thing that I wanted to mention as far as context is that last legislative session we had names reporting and partner notification passed. This session we have seen proposed, and sometimes re-proposed, laws that would criminalize all kinds of behavior, including having sex with somebody if you are HIV-positive or having sex with somebody if you are HIV-positive and do not disclose to them. Following right on the heels of the law creating a database is the suggestion of creating laws that will make it a crime for people who know their HIV status to be doing various things. This is pretty scary.

I want to move from the names reporting hot spots into contact tracing and partner notification. One of the things that this law does is modify who is considered to be a contact. There was already a legal provision talking about what is considered to be a contact for an HIV-positive person and that provision was limited to a sexual contact or needle-sharing partner.

The new law amends this section of the public health law, adding a phrase saying that a contact will also now be a person who is at risk of transmission as determined by the Health Commissioner, and we do not know what that is going to be. We do not know how it is going to be interpreted or broadened, whether that is going to mean somebody who received a needle stick. It is a big question, and it is a big question especially when people start talking about whether it is going to be limited to reasonable risk of transmission, or whether it is going to be anybody who is worried, with no medical support, that perhaps somehow their contact with someone could have led to transmission.

When we see recent studies that show that knowledge of actual risk of HIV transmission is, if not plateauing, maybe even decreasing, then we have to be concerned about what it means to say that some unelaborated "risk of transmission" could justify application of this law.

Another issue for us to watch out for in the regulations is how a contact will be identified. On one end of the spectrum is a suggestion that identifying the contact of an HIV-positive person should mean using information that comes out of a conversation that that person has with his or her physician, which is protected by a version of informed consent, where the physician would say, "This is the result of your test, and now we are going to have a conversation about contact tracing or partner notification, and what contacts you have, and what we will be reporting," and that physician would explain what the partner notification law requires.

Actually, we could say that we might hope that this information would be given ahead of time, when the person is tested, but the bottom line is that in the context of creating this list of contacts to be reported to the State, there should be a conversation with the physician where the physician explains what information is to be taken and what will be done with it. Then people could disclose as they see fit. That is one much more protected option that many advocates have supported.

At the other end of the spectrum is the possibility of some kind of sleuthing through the person's file — I mean, perhaps when they entered care with this physician they had a relationship with somebody whom they mentioned, somewhere deep in the file, maybe a couple years back or whatever — that they might go looking in the background and using various old parts of the medical file in reports to the State, perhaps without any particular discussion about that with the patient.

Obviously, one of the big concerns is what that means for physician/patient relationships in the future and whether people will be greatly deterred from sharing important aspects of their life and their sexual health and maybe drug use with their physician if we have a law in effect that means that anything is fair game for reporting should you develop an illness in the future.

A couple of other points. The law as it is written right now says that when the health departments come to do this actual contact tracing, it will strive for in-person notification unless circumstances reasonably prevent doing so.

Well, what does that mean? I am excused because my car broke down when I was supposed to go notify you? Does it mean I tried twice and you were not home and now I am going to stick notification on the door in a sealed envelope? I mean, that is allowed in certain other cases for service of a notice. I think we would argue that it is not reasonable in this context, but there is no real explanation of what it means to say personal notification unless reasonably prevented from doing so.

There is a major question about the potential retroactive application of this law, and that could be a real hot spot for litigation. If you have gone for an HIV test that was anonymous, then you know that you are given information — or you should be given information — on the current state of confidentiality law and how your testing information and results will be kept private. If we do not see regulations that make it clear that application of this law is prospective only, then we see a real conflict with what people have

signed in the past that they thought protected them, that they thought gave them certain rights to confidentiality, and what this law now requires.

I think it is important to note that there are provisions in the laws regarding criminal and civil liability that not only protect somebody who is acting in good faith trying to comply with this law but also protect someone who might fail to cooperate with the law from criminal or civil liability.

There is a real question about what the section of the law that deals with domestic violence screening will look like when regulations are finally handed down. There is a section of the law that talks about recognition of domestic violence risk and says that there will be identification and screening of both index patients and contacts for domestic violence risk.[131] But there is nothing that says what will be done once these people are supposedly screened, and all kinds of questions about how you would do that screening. For instance, if I have a brief relationship with somebody or went on a date and had sex with somebody two days ago and do not know them very well, how would I contribute to an assessment of their risk for domestic violence?

I have asked some advocates for victims of domestic violence about this, saying, "Well, I understand the sensitivity of doing a domestic violence assessment of a person sitting with you — that is difficult enough. Now, what if I come in and say, 'Well, you know, I just met this person.' Do you think that you can assess through me whether they are at risk for domestic violence?" Nobody has really given me an answer for how on earth that could be effectively done.

In any case, one would assume that coming out of this idea of recognizing domestic violence risk should be some sort of exclusion, at least a limited exclusion — that partner notification would not happen if it were likely to exacerbate domestic violence. But right now what we have is a law that says "there shall be screening" and provides no real direction about what might then be done with it.

So that is going to be a very interesting section to see come down in regulations, and I believe, from some of what I have heard, that it may be a section that has been delaying the regulations.

All right, the last thing that I will say is that a demand that has been made by advocates across the board has been that there

131. *See id.* § 2137.

should be some kind of study of the effect of these measures some reasonable time after they have been put into place, especially since we are talking about the possibility of driving people from testing and treatment.

When we see that possibility in something called a public health law, the effect must be examined, especially when we have studies and indications from clients and patients that we may see severe adverse effects, and especially when we see in the Governor's new budget that millions of dollars are now proposed to be diverted from proven methods of HIV prevention to this extremely expensive system of names reporting and partner notification.

We really have to demand not only a study on rates of infection and deterrence linked to names reporting and partner notification, but also a look at what programs are suffering to fund these measures.

MS PINOT: I was asked to talk about some potential scenarios as a result of the new partner notification, contact tracing law.

I guess I should identify who I am. I am Mildred Pinot from the Community Law Offices of the Legal Aid Society. I am a supervising attorney of the HIV/AIDS Representation Project. I know some of the folks in the audience who I have had the pleasure of working with during the course of my ten years at Legal Aid.

So I am, in fact, going to talk about a couple of scenarios that have come up during the course of some community outreach and education that I have done, in Upper Manhattan primarily, and in the Bronx, because I think it is really important, exceedingly important, not just for us to educate ourselves but to educate the community at large. And, as a service provider, I think it is really important to educate my clients and to have them, in turn, educate their families, their friends and their acquaintances. And that goes for all of you as well.

There are many issues that attach to this legislation. I know, as an advocate that was opposed to it, that traveled to Albany on more than one occasion and spoke to many legislators, it was a difficult and disappointing process, because never in my wildest dreams did I really think this was going to pass. This is retrogressive.

The complexion of the epidemic has changed. Have people noticed that? Interesting how now we have legislative efforts not only to mandate names reporting and contact tracing, but also criminalization of behavior by individuals who happen to be HIV positive.

I am disgusted. I think it is horrific, and there should be a public outcry about this.

Who is affected primarily? Women and men of color and poor people. It was just announced recently — surprise surprise — that HIV/AIDS is an emergency in the African American community. Really? No! $156 million has been earmarked for prevention. Now there is tons of controversy about how that money is going to be used. Lovely. Let's just go out and educate the folks that are getting infected the most. Who are they? Primarily adolescents. I heard a statistic the other day that totally blew me away. It was like two people under the age of twenty-five are infected per hour, on a daily basis. That is amazing. We are doing something wrong. We better start doing it right because if we do not, you think this is an epidemic now? This is going to start killing us off like we cannot imagine.

What is involved? Access to early testing. I talk to teenagers during the course of my work. I am not supposed to, because I am supposed to represent the adults, but I talk to their children, and I have kids who are thirteen, fourteen, fifteen, sixteen, some of whom are parents, telling me "I am not getting a test, I am not having my name going on some list, and then, you know, what if rumor has it that I am HIV-positive and somebody tries to come and kick my butt or kill me?" That is the reality of potential domestic violence. That is the reality of the situation that people do not talk about. I am not talking about, "Oh, I am going to curse you out because I am really enraged that you could have possibility infected me." I am talking real fear of imminent danger.

So this is the stuff that comes up at community forums.

Back to my initial statement, the reason I think it is so important to engage the communities that we serve is because most people do not ever see a copy of legislation. People have never seen this. People do not have an opportunity to read through the law. I take two-and-a-half hours with a community group or other audiences, and I spend an hour and fifteen minutes, and I read the law at community forums, and I have the audience tell me what they find problematic with it. So issues such as the one that Hayley brought up, which I guess are part of my scenarios, are some of the things that come up.

For example, I go to a doctor's office, my first time there. What do you all get when you go to a doctor's office? You get forms, right? You get that little clipboard and a pen. They tell you "could

you please fill this out, could I see your insurance card" — you know, the whole works.

On that form there is all kinds of information that you are listing. When I went for my first ob-gyn examination, I was a nervous wreck. I filled out all the stuff. I got inside, and my doctor said, "Oh, your husband's name is Eric."

I said, "How did you know he was my husband?"

She said, "Oh, I just assumed." You should never assume, because I do not share his last name. He is my husband, but she made an assumption, okay?

Assumptions are made. She asked me about my sexual history, and I shared that information, because, of course, I wanted to do everything I could possibly do to ensure that I had a healthy and good pregnancy. Okay, I am thinking now all that information I gave this provider, who I had never met before — this was a cold call that Eric, my husband, made to a hospital in Westchester County; he figured we will go to Westchester — "small hospitals, we can get a private room when you finally give birth, not a big deal" — I do not know who this woman is, never met her before.

I am developing a relationship with her. She now has all kinds of information about me. She knows how many times I have had miscarriages. She knows all about my gynecological history. She has asked me questions about sexual partners. During the course of your conversation with a medical provider, you share information.

She did not tell me anything about informed consent. She asked me if I wanted to be tested for HIV, if there was any reason why I thought I might be at risk. No, I did not. She asked me if I had ever done IV drugs. No. Anybody I had ever dated? I do not know. But these are just general questions that come up during the course of a regular visit with a physician.

I did not think anything of it then, just like I did not think anything of it when they asked me, "Is it okay to test your baby for HIV?" My initial response was I broke out into a sweat. I swear to God, I broke out into a sweat. I was like, "they are going to test the baby for HIV." Well, that means they are going to test me for HIV. I do not know if I can agree to this. The law had not even passed at the time.

They said, "Well, we really encourage it."

I said, "Okay, test the baby."

When did I get my results? My child is two years old. Had I not called a year later — a year later! — I would not have received the results of my child's HIV test, because no one volunteered that,

and my provider did not volunteer it. I did not say anything because I wanted to see how long it would take. Now mind you, I think, had she been HIV-positive they would have told me, especially because they know I am a lawyer.

It is telling, however, that these are problems. These are glitches within the law. I am at least savvy about this stuff. Most people are not.

So back to accessing care. Here I am at the doctor's office. I fill out a form, talk to my doctor, the doctor writes notes. Mind you, most doctors are not going to want to be in the practice of engaging in partner notification. I do not know that people talk about that, either. I talk to medical providers, and they are asking me, "How the hell can I get around this? I mean, I do not want to do this. Can't I just refer it to the Department of Health?"

I answer, "No, it is your patient's option whether they want to ask you to do it or someone from the Department of Health."

They reply, "So then what do I do if my patient says that I should do it?"

Well, what do you think doctors are going to do? Do you think a doctor is going to go out and try to personally contact someone that is a known contact? No, they are going to delegate that responsibility to someone on their staff. Do you think their nurses, physician assistants, anybody else that they work with is really going to want to engage in partner notification? No. This is a real problem. I do not know how they are going to do all of this.

It is a very expensive law. It is problematic. How is it going to go into effect?

Yesterday was Friday. I spoke to someone from the Department of Health at a legislative session we had up in Harlem:

"So, know anything about the amendments?"

"Amendment? No, do not know a thing. We are having a little trouble getting them together."

We have heard this for months. What is happening here?

First of all, I can tell you what is happening. No money was allocated to this legislation, and it is bad law. It was not properly thought out. It is going to be very, very hard to implement.

Let us talk about the database. My ten-year-old stepson can get into almost any database that exists. How are they going to ensure confidentiality? There is a lot of transmission of information here. You are going from a doctor or a lab or someone else who is authorized to give an initial diagnosis of a positive HIV result, an initial HIV-related illness diagnosis, or a diagnosis of AIDS. That

goes from that whatever you want to call them — entity, individual — to the State Department of Health. Then from the State Department of Health it goes back to the local Department of Health. Gee, that is a lot of transmission of information going around. Problems with potential breaches of confidentiality obviously exist. Who will have access to this information if it is not encoded, it is not encrypted, if they are actually transmitting information in terms of names?

I heard the story of all stories yesterday from a client. The client could not get some benefit, so he hooked up with somebody at the agency, and benefits got in place the next day. I say, "No, you need to stop." The client said, "Oh yeah? It is the truth, and I have no reason to lie to you." The client goes on to say "Now I am having another problem with the same agency, but I do not feel like hooking up with anyone, and I need you to help me. I mean, the first time around, it was fine. But not again." Look, call me naïve. I did not think this stuff went down, all right? It goes down. I did not know about it. Now I know.

What if that agency person gets upset and divulges information? Obviously there was a breach in the instance that Hayley mentioned. Obviously these things happen more than I realized. This is the first I ever heard of the stuff. It is outrageous, and it is problematic, and we need to address it. That is why the commentary period is so important.

The other thing that I was told yesterday is there will be no public hearings but only written comments. Do you know what that means? Written comments mean no one is going to read them. Okay? We better make some major hoopla about this, either for public hearings or to ensure that our comments are, in fact, read, and that it is documented who read them and what recommendation was made upon reading the comments, because otherwise it is an exercise in futility.

MS. GORENBERG: When my o.b. asked me if I wanted to be tested, I had the same sweat reaction. I said "Okay, let's do it, I gotta see," and the lab lost the test. Leads to fantastic confidence in the system, I must say.

MS. PINOT: Unbelievable. People seem to think that we make this stuff up. It is not made up. Now, we are pretty mellow about it. Most people are not that mellow about it. It freaks them out. It is a major decision to be tested. It is not something to be taken lightly. Your entire life changes, or could potentially change, but it

is being treated as a one-shot deal, especially in light of partner notification/contact tracing, and that is problematic.

Do people think that folks in the neighborhood do not know who works for the Department of Health? They know. Just like when you have an STD, people know. Word gets out. If they think you are HIV positive, word is going to get out. People start seeing the same kind of envelopes, same people knocking on doors, word is going to get out. We talk about stigma.

MS. PINOT: If your baby gets tested, derivatively you get tested. Your partner is going to be informed if the child is positive. Your partner is going to be informed, if they know who he or she is.

MS. GORENBERG: I filled out the form when I walked into the doctor's office.

MS. PINOT: They know who it is. It is a problem. It is a real problem. And this is stuff that my clients were telling me: "If I have a baby, you know they test the baby."

"Yes, I know they test the baby. Well, if I list who helped me conceive this child, they are going to tell whoever it is."

"Yes, that is a distinct possibility."

"Well, then, what am I supposed to do? I just gave birth. How am I supposed to deal with that?"

Okay, psychosocial issues. How are they going to deal with this? Is there follow-up counseling for any of this? Have you seen anything apropos? Are people qualified to do it? Anyone funded to do it? I think it is a problem.

Okay, I am sixteen, I am sexually active, I have experimented with IV drugs. Friends suggest I get tested because rumor has it that Jack, who I hung out with last week, has been ill — I mean, in and out of the hospital. People do not know what the deal is with him. I should get tested. I go to an anonymous testing site. Test positive. Not only do I freak out, but after I test positive, I am told — counseled — that I should access care — prophylactic measures, I should talk to somebody. "There are ways to avoid becoming ill, so you should see a doctor."

Who do I go to? Are they going to tell me that if I go to a doctor, who is probably my family doctor, because who else do I know, that he will have to do a confirmatory test and if positive report my name and the names of my known contacts? I guess I could to Planned Parenthood; I guess I could go to GMHC; I guess I could go to a CBO; but when I go I am going to have a confirmatory test. My argument, in this context, has consistently been a

confirmatory test of my HIV status is not an initial diagnosis and, therefore, it should not be reported and my name should not be reported.

Providers are not looking at it that way because they are nervous about being sanctioned. I mean, I do hospital-based legal services. They are telling us, "We are not sure that this is what it says. We want to comply with the law. We would probably err on the side of reporting rather than not." We need to educate, educate, educate, educate.

Okay, so I go. I now have an appointment with my doctor. I am nervous and scared. The doctor says to me, "You want to tell me who you have been with?" It is important, because you should engage in partner notification, and you should not be engaging in at-risk behavior. You need to take care of yourself. It is real, real important. And you, because you are feeling vulnerable at the age of sixteen and freaking out because you tested positive, share some information. They, in turn, have to engage in contact tracing, and they may.

Now, it could be a problem and it could not be a problem. On the other hand, whoever you have been with may have already identified you as a partner. So you may already be on a list. Say you get a letter at home. You are sixteen, get a letter at home from the Department of Health, because of course their attempts to reach you personally failed, and they were good-faith efforts.

They knock on your door. Maybe you are not home. Parents are home. They say, "Have your child get in touch with the Department of Health." Then they send the letter. You think Mom and Dad are not going to ask you why you are getting letters from the Department of Health? Then they may even read the letter.

And then what happens? I have situations where I have sixteen- and seventeen-year-olds who call my office and say, "My Mom just found out that I am positive and kicked me out of the house. My father found out I am positive and said that I cannot touch anything in the house, I cannot touch my brother and sister, I have to get a job. I mean, I gotta take care of business. How can you help me?"

Do we all know about the changes in the welfare laws? What do sixteen-year-olds do if they are not hooked up with another adult, unless they are emancipated? Remember, New York is not an emancipation state. You cannot go to court and get emancipated.

These are real problems, and they have far-reaching repercussions, and people do not think about it.

Say you are in a battering situation. Get tested. So you have been in counseling with a particular community-based agency that can provide comprehensive services. People know who the batterer is. They know who you are hooked up with. It may be a series of batterers that you have been with. I mean, it happens. It could be a historical situation. Is this agency now required to engage in contact tracing, and how much risk are you at this point?

So what is the point of getting tested? I would not. I would do the same things my clients tell me: "No. I would go to an anonymous site, and when I am really, really sick then I will get care."

Is that what this law was designed to accomplish? No. Allegedly, it was to do exactly the opposite, to encourage folks to access care early on, to alert people to the possibility that they may have been exposed to HIV and stem the tide of the epidemic. Well, I think it is going to do exactly the contrary, and I have real issues about informed consent.

What about a false/positive? Do you ever think about that? There are false/positives. I have a couple. People come in, tested positive, two years later come back and tell me, "No. You know what? They made a mistake. Thank you for helping me, and I am very happy."

Okay, the name is on a list now. How do you get it off? What do you do with contact tracing? People may have been contacted. Your life may be completely changed as a result of this. We thought about it enough. The folks who passed the law did not think about it enough.

I am trying to think if there are any other little scenarios that I have not talked about. Interesting questions.

I had a representative from one of those companies that does the HIV tests by mail — they are not New York-based. I forgot where they are. Is it Texas? There is one in Texas, and there is another one, because this gentleman was not from Texas — but anyway, say Texas. Okay, I do an HIV test by mail. This is supposed to be anonymous, except I do not understand, if they are so anonymous — I mean, you call in and you give them a number, but if there is some problem with the blood sample, then you are supposed to send another one, and they send you another kit, but by sending you another kit, they already know who you are.

AUDIENCE: But they do not have to link it to the — they could give you another kit with a new number.

MS. PINOT: Yes, but they send it to your home. Sure, you could send it to a Post Office box, assuming you have a Post Office

box. You could send it to your place of employment. You can send it to a friend's house.

You could send it anywhere. All I am saying is that there is no guarantee of confidentiality — what is confidentiality? Let's be real, okay?

So, anyway, can we use these tests to avoid the law? My problem with it is, say, there is a problem with the blood sample and you then have to do it again and instead of going out and purchasing another one, you call in. They tell you that there was a problem with xyz2000 and "if you give us your address or an address where we can send this, we will send you another one." All right, that is okay. Give somebody else's. I will give my mother's address, okay? Fine. What then? What happens then? Say you are positive. What do you do? What do you do?

Do you access care? How do you document that you are positive? You have this thing with a number on it. How do you know it is you? You know, I can see doctors going "No, no, no. This will not do. You have to take an initial HIV test here in the State of New York." And that is a problem because then there is disclosure; you know, you have to report.

Okay, I am trying to be creative. I am trying to think of as many scenarios as possible. You want to help me out?

AUDIENCE: Well, who has access to the lists legally?

MS. PINOT: The Department of Health.

AUDIENCE: Does anybody else? I mean, insurance companies, criminal justice?

MS. PINOT: Well, at the moment —

MS. HANSSENS: Illinois adopted a measure authorizing use of the state AIDS registry to crosscheck with names of licensed heath care workers, although it has not been implemented. So, in theory, laws can be adopted allowing access or use outside the state health department. The CDC currently is advancing the adoption of a model state privacy law that would allow health officials across the country — local, state and federal — to all share identifiable information of persons with HIV. Such use would not be considered a disclosure requiring affected individuals' informed consent. Once names-based registries of those with HIV have been created, the list of agencies and individuals who have access to this information can be changed with the stroke of a legislative pen.

AUDIENCE: Could you file a Freedom of Information Act request, if you are in litigation or anything like that?

AUDIENCE: Well, the law as it is written says that confidentiality will be maintained and will only be disclosed "as necessary to further the provisions of this Title."[132] But then, we have questions about what that really means, what is going to be necessary — especially when you see amendments that are pulling out things like a doctor before could make certain kinds of disclosures if the doctor reasonably believed there was the risk of transmission. Well, they struck the word "reasonably."

MS. HANSSENS: Well, there are two words which illustrate how officials might define "necessary": Nushawn Williams. Local officials responded by taking his picture into schools, and his mug shot broadcast on national television. While health department officials may not have intended that broad a result, the incident demonstrates that health officials, both state and federal, either are unwilling or unable to control those kinds of disclosures, particularly in changed situations.

AUDIENCE: And who is doing data entry? I mean, if we do not think that the Commissioner of Health is going to do this in a wrongful way — in the call that I got in my office — I mean, who was this person? I do not believe — although I do not know who it was — I do not believe that it was a high-ranking official at the local Department of Health or at the Division of AIDS Services, but it was a data entry person or it was a caseworker or it was somebody who had access to a computer screen.

AUDIENCE: In Florida last year there was this guy who worked for the Florida Department of Health, took the records and threatened to publish them in two newspapers.

AUDIENCE: Well, he sent them to the newspapers.

AUDIENCE: But the newspapers refused to publish it.

MS. HANSSENS: They prosecuted him and he got probation.

AUDIENCE: I am still confused on when you said the law presumes anonymous testing and yet you have to have names reporting. That does not seem to go.

MS. PINOT: You can go to an anonymous testing site and be tested. That is your option.

AUDIENCE: But once your doctor or someone else —

MS. PINOT: The big issue, or the big question, is if you go to a doctor to access care and the doctor suggests — because you tell the doctor "I am HIV, having a confirmatory test done" — the question is, is that test confirming your HIV diagnosis an initial test

132. *See id.* § 2139.

or not? Our argument is that it is not and, therefore, your name should not be reported.

We do not know what the regulations are going to say, but they hear us talking, so in all likelihood it is going to say if you get tested anonymously, upon accessing care a confirmatory test will be deemed an initial test subject to the requirements of the new law.

AUDIENCE: We should say as a baseline, though, — and maybe this goes to your question — that before this law, we had anonymous testing and we had confidential testing. There were specially licensed sites to do anonymous testing, and then there was your confidential document if you go to your doctor, or something. So what they are saying, we think, is that those anonymous sites, specially funded to give anonymous testing rather than confidential testing, will —

AUDIENCE: Well, it is just that with the partner notification I am wondering — I do not mean this to sound funny, given the political climate today, but where they say they have to contact your sexual partners, what is their definition of a "sexual partner?" What kind of sex are they talking about? What if you refuse to give names, or what if you honestly do not know the name of the person you had sex with?

AUDIENCE: There are, in fact, no criminal penalties, and I would suggest that you identify Assemblyperson Nettie Meyersohn.

MS. PINOT: She is the one that is pushing the "unblinding" of — she wants to make these lists of names available to other entities.

MS. HANSSENS: This happened with the newborn testing here in New York and this is something that Liz Cooper worked on a lot. We had blinded seroprevalence surveys among newborns, and once that information was there, Assemblyperson Meyersch was one of these people that pushed to say babies are going home and dying. So, with a stroke of the legislative pen, an anonymous survey turned into mandatory names reporting.

The bottom line is that once a list is there, then there will be this desire — this uninformed, usually politically driven desire — to use the data for other purposes. History supports us on this.

For folks that have money, these things are much less of a problem. There have always been doctors, certainly in the gay community, that will allow you to test as Donald Duck and you could still test as Donald Duck in a names reporting system. The problem is

that, for individuals who rely on publicly-funded benefits to survive, there may be some problems with continuing through the system as Donald Duck.

But there are certainly doctors — there always have been doctors — who will not report and who will do everything they can to protect their patients. So part of what you do is for your own protection is identify those doctors, and you also try to work with clients.

Ultimately, a lot of these policies are driven by politics and funding, funding, funding.

The CDC wants these names and numbers for a variety of reasons unrelated to the ones that they are offering. Politician want names; government agencies want numbers to show that they deserve funding. There has been incredible pressure on the states, and it was clear even from members of the New York State HIV Advisory Council that they believed if they did not adopt a names-based reporting system, that we would lose funding. So a lot of the rhetoric supporting HIV reporting strikes me as an "emperor with no clothes" situation. There are mainstream health officials and even some directors of aids service organizations in the receiving line for this naked king that are saying, "You look fabulous, you look fabulous." And then there are the rest of us in the crowd that are saying, "Excuse me, I think you are naked."

AUDIENCE: There is an interesting and very painful historical twist in all this, which is that there was sort of a concession early on, or an understanding early on in the epidemic, that with AIDS when people got sick, they really died very close to the time of diagnosis. And now, ironically enough, we have all these reasons to give people incentives to go ahead and get tested early so that they can go ahead and get treatment — the direct opposite of what a lot of Millie's clients talk about — and yet, we now are putting in a roadblock at exactly the time that we want to encourage people to go in to get tested, and possibly to get care. The irony of those things happening at the same time, quite frankly, on the backs of poor people and largely people of color, is just too painful in this epidemic.

AUDIENCE: And for data that is largely useless for the purposes that they are saying that they are collecting it.

AUDIENCE: A question and a comment. On unique identifiers, I mean, I realize that that has been thrown out as a way of trying to back off on names reporting. On the other hand, given all the risks to what happens to a database once it exists, and the fact

that for unique identifiers to work somebody has to have a match of the name and the unique identifier somewhere — I mean, that exists physically somewhere in the world.

AUDIENCE: It does not have to, actually. Anna Forbes of Philadelphia is the most brilliant person who could explain why you do not actually have to have a master list.

AUDIENCE: My concern is that even using unique identifiers, (1) there is a reality of a risk of confidentiality being breached, and (2) perhaps more important, is that there is probably going to be the same perception by people who are going to be deterred from taking the test.

AUDIENCE: And that has been shown.

AUDIENCE: It just struck me through the whole debate that while there was sort of a political tactic to raising unique identifiers, does it really accomplish anything? Does it really accomplish what we want it to accomplish with respect to the problems with names reporting?

The second question is, has there been any enforcement of the provisions of Article 27-F, the confidentially provisions that have been in effect now for a number of years in New York State? I think there actually are criminal penalties attached, right? Has anyone anywhere in New York State been prosecuted? Is it enough for institutions to think that if they err on the wrong side of reporting — for example, if they decide something is initial and it is not — they could be running afoul of that law?

MS. PINOT: Not if they are acting in good faith. There are some handouts here, but one of the ones that I brought says "disclaimers." If you are acting in good faith in carrying out the provisions of the law, no criminal or civil liabilities attach —

AUDIENCE: So then the 27-F pressures just do not exist in that whole, so there is no incentive to err on that side.

The other thing I just wanted to mention is on the domestic violence point. The domestic violence provisions that are passed with respect to welfare are an abomination. The supposed domestic violence community was part of creating that abomination; they were part of creating the abomination as to the regulations, enforcing it. I would not trust either the administration, obviously, or people who call themselves domestic violence advocates to inform you on those provisions, and I would certainly — (1) they did not consult any poor people advocates, and certainly did not want consult poor people's advocates, because we are seen as pariah and likely to

turn off the Governor because we actually care about the lives of poor people.

I would suggest — I am saying this very strongly, since it is absolutely true, and it has been a nightmare — that when it comes to domestic violence provisions, expect the worse. And certainly do not limit your consultations to people who call themselves domestic violence advocates, because they are dangerous.

MS. HANSSENS: Can I just answer your first question? I think what you are suggesting about unique identifiers is absolutely true. I think that the problems, the basic problems, with names reporting as surveillance — those are different things — are the same for unique identifiers as they are there. That is one of the reasons Lambda has never actively supported unique identifiers — we do not support HIV test reporting in any form as a way of getting a reliable picture of the epidemic.

In fact, the Latino Commission on AIDS did a phone survey with graduate students calling people with Hispanic surnames, and found that there was not a substantial difference between unique identifiers and names reporting in deterring people from willingness to get tested.

This fear is not unfounded. If I had a choice of a name and I could say, use either "Donald Duck," or a unique identifier that includes the last four digits of my Social Security number — well, all I have to do is put those four numbers into a phone call to Visa and they say "Hi, Catherine Hanssens, how are you?" I mean, it is particularly easy to track people down with a social security number, and then of course there are immigrants at risk who do not have a number at all.

I think that people supported unique identifiers because people believe we need a better picture of the epidemic and it is a preferable alternative to names reporting. Fine, we do need a better picture – but none of the information we have about IV drug use has ever produced broad-based government support for needle exchanges.

In fact, in New Jersey when people involved in needle exchange programs are being chased down, prosecuted, arrested and programs are being shut down, and the information we know about youth is rejected for abstinence-only-based prevention education, what reason do we have to believe that more data will produce better programs?

AUDIENCE: Universal health coverage with confidentiality would do a lot more for giving a good picture of what is happening in the epidemic.

It also would be interesting to see — you know, there are unique identifiers in Massachusetts, starting in Massachusetts, and they have it in Maryland. It will be interesting if they are going to do a follow-up study, also to see negative impact, if any, and then do some sort of comparison in those states that have gone to name reporting and those that have gone to unique identifiers.

The problem with those systems, though, is that the systems — the Maryland system sucks. Excuse me, but it does. It is dumb. It is also based on using a portion of the Social Security number, which leaves out — oh, who are we forgetting? — oh, immigrants. There are those folks, of course, but they do not get HIV, so we are not really losing anything.

MS. PINOT: And if they do, we do not care, right?

AUDIENCE: We do not care because we are not going to give them health care.

And the system in Massachusetts is actually sort of scary, too, I think.

Plus, any unique identifier system you did manage to put together would do nothing for the contacts. If you are named as a contact, you are on the list. I mean, you are there. There is no way you can manipulate that any other way.

MS. PINOT: I mean, think of the potential for being on a contact list. I mean, I could be ticked off at all of you and put you all on my contact list.

AUDIENCE: But the track-back thing, again, there is this whole sort of suggestion that we need to be able to indefinitely — I mean, because if you are HIV-positive, it will be, as far as we know, it will be a pretty long time, somebody checking in on you. When you take a test, you do not, I think, envision that somebody from the Health Department is going to have the ability to track you and show up at your door — which, frankly, is not much better than a letter, and in fact most of the data that we have —

On the off chance that New York did end up adopting a unique identifier system, what additional obstacles would you see, considering the fact that New York has such a higher seroprevalence compared to Maryland and Massachusetts?

You mean in terms of that it is more difficult to do it?

I mean, in terms of if you are having the last four digits of the Social Security code.

MS. HANSSENS: Well, I never totally understood, first of all, why numbers are viewed as inherently more difficult than letters. I mean, just conceptually I do not understand that. My name is routinely misspelled. It is misspelled here in the program. It is always wrong. There is this sort of notion that it has to be a Social Security number. How many people here have AOL or use the Internet?

And you made up your own name, right, and you fed it in, and in nanoseconds they told you if that name was taken. So if you wanted to be reddog69, and damn, it was taken, you could become reddog70.

And that is your identifier. You have made up that name. The odds are — even if you are drunk or forgetful — that you will remember your identifier because it is your own special name named after your first love or your dog or whoever. So the likelihood that people will remember that and give that and that can be keyed to that test and subsequent tests is pretty decent. We have the technology.

Health officials, they talk about traditional health methods as if traditional forms of medical treatment — you know, like attaching leeches to your body — somehow have this kind of permanent value. And, in fact, as Matthew explained, this epidemic is different than the ones that we adopted these methods for in the 1920s and 1930s, where you slept with a few folks, you were tested, you were treated, you were rendered noninfectious. If they found out who you were with, they could treat you and render you noninfectious and that was the end of it.

This is very different, but there is no reason why, with the technology that we have, that we need or should rely on a names-based system to track people with HIV, but this is the way it has always been done. They would have to change some things, and bureaucrats hate change.

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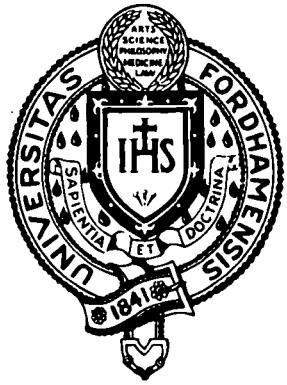
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